SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 838.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

GEORGE E. BOWLING, FRANCIS McMASTERS, AND THE MIAMI INVESTMENT COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from U. S. Circuit Court of Appeals	a	1
Amended petition	1	1
Exhibit "A." Patent issued to William Wea, dated Apr. 8, 1890	3	3
Exhibit "B." Approved list of heirs of William Wea	5	4
Motion to strike	6	5
Separate demurrer of Francis McMasters	7	6
Order sustaining motion of George E. Bowling and Miami Investment Co. to strike	8	7
Order overruling demurrer of Francis McMasters	8	7
Defendants' answer	9	7
Motion to require defendants to make their answer more definite and certain	10	8
Order sustaining motion to make defendants' answer more definite and certain	10	9
Reply	11	9
Judgment	11	9
Order enlarging time for filing bill of exceptions	12	10
Bill of exceptions	12	10
Stipulation as to value of rents	13	10
Colloquy between court and counsel	13	11
Government's Exhibit No. 1. Approved list of heirs of William Wea	16	13
Government's Exhibit No. 2. Defendants' answer	18	15
Quitclaim deed from Charles Stanley et al. to George E. Bowling, dated Nov. 8, 1905	19	16
Quitclaim deed from Jessie Rice et al. to George E. Bowling, dated Oct. 20, 1915	21	17
Order settling bill of exceptions	23	19

	Original.	Print.
Petition for writ of error	24	20
Assignment of errors	24	20
Order allowing writ of error	25	21
Writ of error	26	21
Return to writ	27	22
Citation, with acknowledgment of service	27	22
Notice and agreement as to contents of printed transcript	28	23
Certificate of clerk	29	24
Proceedings in the U. S. Circuit Court of Appeals	31	25
Appearance of Mr. W. P. McGinnis and Mr. J. C. Wilhoit as counsel for plaintiff in error	31	25
Appearance of counsel for defendants in error	31	25
Appearance of Mr. Cliff V. Peery as counsel for plaintiff in error	32	25
Order of submission	32	26
Opinion, U. S. Circuit Court of Appeals	33	26
Judgment, U. S. Circuit Court of Appeals	38	29
Petition for writ of error from Supreme Court, U. S	38	30
Assignment of errors on writ of error from Supreme Court, U. S	39	30
Order allowing writ of error from Supreme Court, U S	42	32
Writ of error from Supreme Court, U. S	43	32
Citation on writ of error from Supreme Court, U. S	45	34
Clerk's certificate to transcript	48	35

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December term, 1919, of said court, before the Honorable Walter H. Sanborn, circuit judge, and the Honorable Thomas C. Munger and the Honorable Frank A. Youmans, district judges.

Attest:

E. E. KOCH,

[SEAL.] *Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to wit, on the fifth day of October, A. D. 1918, a transcript of record, pursuant to a writ of error directed to the District Court of the United States for the Eastern District of Oklahoma was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the United States of America was plaintiff in error and George E. Bowling et al. were defendants in error, which said transcript as prepared, printed, and certified by the clerk of said district court in pursuance of an act of Congress approved February 13, 1911, is in the words and figures following, to wit:

1 In the United States District Court for the Eastern District of Oklahoma.

Pleas and proceedings before the Honorable Ralph E. Campbell, judge of the District Court of the United States for the Eastern District of Oklahoma, presiding in the following entitled cause:

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* GEORGE E. BOWLING, FRANCIS McMASTERS, AND THE Miami Investment Company, a corporation, defendants,	Law.	No. 2264.

United States of America, plaintiff in error, vs. George E. Bowling, Francis McMasters & the Miami Investment Company, a corporation, defendants in error.

In the United States District Court for the Eastern District of Oklahoma. United States of America, plaintiff, v. George E. Bowling, Francis McMasters, and the Miami Investment Company, a corporation, defendants.—No. 2264–L.

Amended petition.

Comes now the United States of America by D. H. Linebaugh, United States attorney for the Eastern District of Oklahoma, by direction of the Honorable Thomas Watt Gregory, Attorney General of the United States, at the request of the Secretary of the

2 Interior, and brings this suit in its own behalf of the heirs at law of William Wea, deceased, Peoria allottee No. 103, of the Peoria Tribe of Indians, against the defendants, George E. Bowling, who is a resident of the State of Missouri, residing in Kansas City in said State; Francis McMasters, who is a citizen of the State of Oklahoma, and a resident of the eastern judicial district thereof; and the Miami Investment Company, which is a corporation organized and doing business under the laws of the State of Oklahoma, being a citizen of the said State and an inhabitant of the eastern judicial district thereof, and for cause of action against the said defendants, alleges and states:

That the following described land, to wit, the north half of the northeast quarter and lots Nos. three (3) and four (4) of section twenty-five (25), and lot one (1) of section twenty-seven (27), township twenty-eight (28) north, range twenty-two (22) east, and lots Nos. one (1) and two (2) of section thirty (30), township twenty-eight (28) north, range twenty-three (23) east, of the Indian meridian, containing in the aggregate 198.88 acres, was duly allotted under and by virtue of the act of Congress approved March 2, 1889, to the said William Wea as his distributive share of the lands belonging to the said tribe in the Indian Territory, which said allotment was duly approved by the Secretary of the Interior in accordance with the provisions of the said act of Congress, and on the 8th day of April, 1890, there was duly issued to the said William Wea a patent conveying the said lands unto the said William Wea and his heirs, a full, true, and correct copy of which patent is hereto attached, marked "Exhibit A" and made a part of this petition.

Plaintiff further alleges and states that the said William Wea died intestate on or about the 23rd day of January, 1894, seised of the real estate above described and leaving as his sole heirs at law the persons set out in Exhibit B, hereto attached and made a part of this petition, all of whom are members of the confederated Wea, Peoria, Kaskaskia, and Piankeshaw Tribes of Indians, which said Indians are still under the supervision and control of the Quapaw Indian Agency in Ottawa County, State of Oklahoma, and plaintiff still maintains supervision and control over their property and affairs and continues to provide for their general welfare, and said persons as set out in Exhibit B were duly declared the heirs at law

of William Wea by the Secretary of the Interior on October
3 19, 1914, pursuant to the acts of Congress with reference thereto; and said heirs are now entitled to the immediate possession of the same.

That on or about the first day of January, 1904, the defendants unlawfully entered into and now are in possession and actual occupancy of said premises without leave of the plaintiff, or its agents, and without the consent of said heirs, or any right or title thereto, and unlawfully withhold the possession thereof from the heirs of the said William Wea, deceased, and upon demand have refused and con-

tinue to refuse to deliver the possession thereof to the plaintiff, its officers and agents, and the said heirs of the said William Wea, deceased.

Plaintiff further states that said defendants have unlawfully kept the heirs of the said William Wea, deceased, out of the possession of said property for the past 10 years, beginning with the month of January, 1904, and that the reasonable annual rental market value of said property is $500.00, and that said defendants have collected and used for their own benefit during said time the rents and profits arising from said real estate amounting to $5,000.00.

Wherefore, plaintiff prays judgment against the defendants for the possession of said premises and for $5,000.00 damages as rents and profits, for the use and benefit of the lawful heirs of the said William Wea, deceased, and for costs and other proper relief.

D. H. LINEBAUGH,
United States Attorney,
By CARTER SMITH,
United States Attorney.

Exhibit A.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

Whereas there has been deposited in the General Land Office of the United States an order bearing date February 27, 1890, from the Secretary of the Interior, directing the patenting of certain selections made by the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians as contemplated by the act of Congress, approved March 2, 1889, entitled "An act to provide for allotment of land in severalty to the United Peorias and Miamies in Indian Territory, and for other purposes" (25 Stat. 1013), from which it appears that pursuant to said act Pe-te-lon-o-zah, William
4 Wea, a member of the Wea, Peoria, Kaskaskia, and Piankeshaw tribe has selected the following-described tract of land, to wit, the north half of the northeast quarter and lots numbered three and four of section twenty-five and lot numbered one of section twenty-seven, in township twenty-eight north, of range twenty-two east; and lots numbered one and two of section thirty, in township twenty-eight north, of range twenty-three east of the Indian Meridian in the Indian Territory, containing in the aggregate one hundred and ninety-eight and eighty-eight hundredths of an acre, which selection was duly approved by the Secretary of the Interior in accordance with the provisions of said act;

And whereas it is made to appear that in the making of said selection and allotment, said statute has in all its requirements been duly complied with:

Now know ye, that the United States of America, in consideration of the premises and in conformity with the terms of said act, selec-

tion, order, and list aforesaid, has given and granted, and by these presents does give and grant, unto the said Pe-te-lon-o-zah, or William Wea, and his heirs, the tract of land above described; Provided, That the said lands shall not be alienated nor subject to levy, sale, taxation, or forfeiture for a period of twenty-five years from the date hereof, and any contract or agreement to sell or convey said land before the expiration of said period shall be absolutely null and void; to have and to hold the said land with the appurtenances thereunto belonging unto the said Pe-te-lon-o-zah, or William Wea, and to his heirs forever, with proviso as aforesaid.

In testimony whereof I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this eighth day of April, in the year of our Lord one thousand eight hundred and ninety, and of the independence of the United States the one hundred and fourteenth.

By the President:

BENJAMIN HARRISON,
By M. McKEAN, *Secretary.*
[SEAL.] J. M. TOWNSEND,
Recorder of the General Land Office.

5 "*Exhibit B.*"

THE OFFICE OF THE SECRETARY.

Approved: It appears from the evidence adduced in this case that the heirs to the estate of William Wea, deceased, Peoria allottee, No. 103, and their respective shares are as follows:

Elwood Greer, husband of subsequently deceased great granddaughter of predeceased sister of predeceased grandfather	1/12 or 30/360
Nancy Beaver Farris, great granddaughter of predeceased sister of predeceased grandfather	1/24 of 15/360
Frank Beaver, great grandson of predeceased sister of predeceased grandfather	15/360
Thomas Peckham, grandson of predeceased sister of predeceased grandfather	60/360
Asa Froman, great great great grandson of predeceased sister of predeceased grandfather	6/360
Mary Froman, great great great granddaughter of predeceased sister of predeceased grandfather	6/360
Lizzie Froman, great great great granddaughter of predeceased sister of predeceased grandfather	6/360
Guy Froman, great great great grandson of predeceased sister of predeceased grandfather	6/360
Ozetta Froman, great great great granddaughter of predeceased sister of predeceased grandfather	6/360

Amos Eddy, great great great grandson of predeceased sister of predeceased grandfather 15/360
Edna King, nee Eddy, great great great granddaughter of predeceased sister of predeceased grandfather 15/360
James Thompson, son of predeceased brother of predeceased mother 1/12 or 30/360
I-ot-stuck or Jesse Rice, grandson of predeceased brother of predeceased mother 30/360
M-zhick-te-no, son of predeceased sister of predeceased mother 60/360
Shaw-que Tapsee, grandson of predeceased sister of predeceased mother ..... 1/18 or 20/360
Op-tuck-quick Tapsee, grandson of predeceased sister of predeceased mother 20/360
6 Wah-sah-quah Tapsee, granddaughter of predeceased sister of predeceased mother 20/360

Inasmuch as this land was held under a restricted deed, no fee is to be collected for this determination.

(Signed) Bo Sweeney, *Assistant Secretary.*

State of Oklahoma, *Muskogee County, ss:*

Carter Smith, being first duly sworn, states that he is an assistant United States attorney for the Eastern District of Oklahoma, and one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing petition; and that the statements contained therein are true, as he verily believes.

Carter Smith.

Subscribed and sworn to before me this the 2nd day of March, 1915.

[seal.] R. P. Harrison, *Clerk.*
By L. S. Trimble, *Deputy.*

(Endorsed:) Filed Mar. 4, 1915. R. P. Harrison, clerk, U. S. District Court, Eastern District of Oklahoma.

And, to wit, on the 5th day of April, A. D. 1915, the defendants, George E. Bowling and Miami Investment Company, filed motion to strike out, which is in words and figures as follows:

Motion to strike out.

Now at this day come the defendants, George E. Bowling and the Miami Investment Company, and move the court to strike from plaintiff's petition the following, to wit:

Commencing on the last line of the second sheet of said amended petition with the words "and said persons" and extending to and including the words "with reference thereto" in the third line of the third page of said amended petition.

For the reason that said part of said amended petition is entirely immaterial and injects into the case an issue which is not proper and

which could not be binding upon any of the parties and only tends to confuse the actual issues.

HALBERT H. McCLUER,
ROLAND HUGHES,
Attorneys for Defendants, George E. Bowling and Miami Investment Company.

7 (Endorsed:) Filed Apr. 5, 1915. R. P. Harrison, clerk U. S. District Court, Eastern District of Oklahoma.

And, to wit, on the 18th day of February, A. D. 1915, the defendant Francis McMasters filed demurrer herein, which said demurrer was refiled on the 10th day of March, A. D. 1915, and is in words and figures as follows:

Separate demurrer of defendant Francis McMasters.

Now at this day comes the defendant Francis McMasters and for his separate demurrer to plaintiff's petition heretofore filed in this cause says:

(1) That the petition does not state facts sufficient to constitute a cause of action.

(2) That the plaintiff has no legal capacity to maintain this suit.

(3) That the petition shows upon its face that the plaintiff is not entitled to the relief sought and has no right to the possession of the premises, the possession of which is sought to be recovered; and also shows that the plaintiff has no legal right to maintain this suit for and on behalf of the parties mentioned and designated in this petition as being entitled to the possession of the land.

HALBERT H. McCLUER,
ROLAND HUGHES,
Attorneys for Defendant Francis McMasters.

The undersigned counsel hereby certify that the foregoing demurrer is not filed for vexation or delay, but in good faith; and they further certify that in their opinion after investigation the grounds of the demurrer are well taken, and that the same should be sustained.

HALBERT H. McCLUER,
ROLAND HUGHES,
Attorneys for Defendant Francis McMasters.

(Endorsed:) Filed Feb. 18, 1915. Refiled Mar. 10, 1915. R. P. Harrison, clerk U. S. District Court, Eastern District of Oklahoma.

8 And, to wit, on the 16th day of March, A. D. 1916, the same being one of the days of a special session of the United States District Court for the Eastern District of Oklahoma held at Muskogee, Oklahoma, court met pursuant to adjournment. Present and presiding the Honorable Ralph E. Campbell, judge.

Among the proceedings had on this day is the following:

Order sustaining motion to strike.

Now, on this 16th day of March, 1916, on consideration of the motion to strike, heretofore filed herein by the defendants Bowling and Miami Investment Company, which motion to strike has been heretofore argued by counsel and by the court taken under advisement,

It is ordered, That said motion to strike out be, and it is hereby, sustained, and there is stricken from the amended petition that portion of the petition reading as follows:

"And said persons as set out in Exhibit B were duly declared the heirs at law of William Wea by the Secretary of the Interior on October 19, 1914, pursuant to the acts of Congress with reference thereto."

To which action of the court in sustaining said motion to strike out the plaintiff asks and is allowed its exceptions. The defendants Bowling and Miami Investment Company are given thirty days in which to further plead.

RALPH E. CAMPBELL, *Judge.*

Order overruling demurrer.

Now, on this 16th day of March, 1916, on consideration of the demurrer of defendant McMasters heretofore filed in this cause to the amended petition, which demurrer has heretofore been argued by counsel and by the court taken under advisement,

It is ordered, That said demurrer be, and it is hereby, overruled, and the defendant McMasters is given thirty days in which to further plead. To which action of the court the defendant McMasters asks and is allowed his exceptions.

RALPH E. CAMPBELL, *Judge.*

9 And, to wit, on the 12th day of April, A. D. 1916, the defendants filed herein their answer, which is in words and figures as follows:

Defendants' answer.

Now, at this day come the above-named defendants and admit that they are in possession of the land mentioned in plaintiff's petition; and further admit that the said land was allotted under and by virtue of an act of Congress approved March 2, 1889, to one William Wea, deceased; and these defendants deny each and every other allegation in plaintiff's said petition contained.

These defendants specifically deny that the parties mentioned in plaintiff's petition and for whose use and benefit this suit is alleged to have been brought have or had the relationship mentioned in plaintiff's petition or any relationship whatever to the said allottee William Wea, deceased; and also deny that said parties are the

heirs or any of the heirs of the said William Wea, deceased, or that any one of them is or was an heir of the said William Wea, deceased, or have or had any interest in the land mentioned in plaintiff's petition in any manner whatever.

These defendants further answering allege that they are rightfully in possession of the said premises under and by virtue of the authority of the real heirs of the said William Wea, deceased.

These defendants further answering allege that all of the restrictions contained in the original patent issued in this case to William Wea, deceased, expired on the 5th day of April, 1915, and that therefore the United States of America does not have the right to recover possession of the land involved in this suit either on behalf of itself or for the parties mentioned in the petition or for any other party whatever; and these defendants further answering deny that the Government of the United States has the right to further prosecute this suit for damages for any alleged wrongful withholding of the possession of the said premises by reason of the fact that all limitations on the right to convey said premises in fee simple expired on Apr'l 5, 1915, and a cause of action, if any exists, is now vested in the heirs of William Wea, deceased, or their assigns.

And defendants having fully answered ask to be discharged with their costs herein expended.

ROLAND HUGHES,
HALBERT H. McCLUER,
Attorneys for Defendants.

10 (Endorsed:) Filed Apr. 12, 1916. R. P. Harrison, clerk, U. S. District Court, Eastern District of Oklahoma.

And, to wit, on the 30th day of January, A. D. 1917, the plaintiff filed motion to make defendant's answer more definite and certain, which is in words and figures as follows:

Motion to require defendants to make their answer more definite and certain.

Comes now the plaintiff, and leave of court having been first obtained, moves the court to require the defendants to make their answer more definite and certain in the following particulars, to wit:

That the defendants be required to state the names of the real heirs of said William Wea, and by what authority they claim to be in possession of said premises from said heirs, whether by deed, lease, or contract, instead of stating conclusions of law as set out in the third paragraph of their answer, wherein they allege:

"These defendants further answering allege that they are rightfully in possession of the said premises under and by virtue of the authority of the real heirs of the said William Wea, deceased."

J. C. WILHOIT,
Assistant United States Attorney.

(Endorsed:) Filed Jan. 30, 1917. R. P. Harrison, clerk, U. S. District Court, Eastern District of Oklahoma.

And, to wit, on the 5th day of March, A. D. 1917, the following proceedings were had in this cause, Honorable Ralph E. Campbell, judge, presiding:

Order sustaining motion to make defendant's answer more definite and certain.

Now, on this 5th day of March, 1917, upon consideration of plaintiff's motion to make answer more definite and certain, it is ordered that said motion be, and the same is hereby, sustained, and the defendants are given ten days within which to comply with the motion.

11 And, to wit, on the 16th day of March, A. D. 1917, the defendants' filed amended answer, which said amended answer was introduced in evidence at the trial of this cause and made a part of the bill of exceptions herein.

And, to wit, on the 25th day of February, A. D. 1918, the plaintiff filed reply to the amended answer, which is in words and figures as follows:

Reply.

Comes now the plaintiff herein, by W. P. McGinnis, United States attorney for the Eastern District of Oklahoma, and for reply to defendants' answer alleges and states:

That said plaintiff denies each and every material allegation of new matter set out in said answer.

W. P. McGinnis,
United States Attorney.
J. C. Wilhoit,
Assistant United States Attorney.

(Endorsed:) Filed Feb. 25, 1918. R. P. Harrison, clerk U. S. District Court, Eastern District of Oklahoma.

And, to wit, on the 5th day of March, A. D. 1918, the following proceedings were had in this cause, Honorable Ralph E. Campbell, judge, presiding:

Judgment.

Now, at this day, Tuesday, March 5th, 1918, the same being the second day of the March term of the above court for 1918, at Vinita, the above cause coming on for hearing, the plaintiff appearing by J. C. Wilhoit, special assistant to the United States, appearing in person and by their attorneys, Halbert H. McCluer, Roland Hughes, and Verne E. Thompson. Each party announces ready for trial, and a jury being waived by each party by an agreement in writing and also in open court, the cause is heard by the court without a jury; and the court after hearing the evidence on behalf of both the plaintiff and defendants, the arguments of the attorneys for the respective parties, and being fully advised in the premises, finds the issues in favor of the defendants.

12 It is therefore ordered and adjudged that the plaintiff taking nothing by reason of this suit, and that the defendants go hence without day, to all of which plaintiff excepts, which exception is allowed, and give notice of appeal in open court.

For good cause shown, plaintiff is given and allowed ninety days within which to prepare and serve bill of exception; said defendants, five days to suggest amendments and same to be settled on two days' notice.

RALPH E. CAMPBELL, *Judge.*

And, to wit, on the 24th day of July, A. D. 1918, the following proceedings were had in this cause, Honorable Ralph E. Campbell, judge, presiding:

Order enlarging time for filing bill of exceptions.

This day came the plaintiff and made application for an order extending the time of signing, allowing, filing, and serving of bill of exceptions herein, and good cause being shown therefor, such application is granted and the time for the signing, allowing, filing, and serving of the bill of exceptions of the above-named plaintiff is extended for 30 days from and after the 1st day of August, 1918; and the defendants are hereby allowed five (5) days thereafter to suggest amendments thereto, the said bill of exceptions to be settled upon two (2) days' notice.

Done in open court this 24 day of July, 1918.

RALPH E. CAMPBELL, *Judge.*

And, to wit, on the 17th day of August, A. D. 1918, the plaintiff filed its bill of exceptions herein, which is in words and figures as follows:

Bill of exceptions.

Be it remembered that on this the 5th day of March, 1918, the above-entitled cause coming on for trial before the Honorable Ralph E. Campbell, judge, presiding, the complainant appearing by J. C. Wilhoit, assistant United States district attorney, and the defendants appearing by their counsel, H. H. McCluer, Roland Hughes, and Vern E. Thompson; all parties announcing ready for trial, a jury was waived and the following proceedings were had before the court.

13 *Stipulation.*

Mr. WILHOIT. It is stipulated by and between the parties hereto that the rental value of the land for the ten years alleged in the petition is as follows: For the first five years, two hundred dollars a year; for the second five years, three hundred dollars a year, making a total of twenty-five hundred dollars with interest from the various dates that the amounts became due; that the land described in

plaintiff's petition was duly allotted and patented to William Wea, a member of the Peoria Tribe of Indians, allottee No. 103, as shown by Exhibit "A" attached to said petition, and that said William Wea died intestate on or about the 23rd day of January, 1894.

Mr. McCLUER. That is correct.

Mr. WILHOIT. The Government offers in evidence a certified copy of the findings of the Secretary of the Interior determining the heirs of William Wea, which has been marked "Government's Exhibit No. 2" for identification.

Mr. McCLUER. The defendants desire to object to the introduction of that document, for the reason that it is not binding upon them in any manner, the land involved in this suit not being covered by the act of Congress authorizing the Secretary to determine heirship. The final patent on this land had issued prior to the passage of this act and prior to any action taken by the Secretary of the Interior. We object further because there is no allegation in their petition that the Secretary of the Interior had determined heirship. There was one, and by the action of the court that was stricken out. And we object further because, as far as this proceeding is concerned, the action of the court in striking that out is determined.

The COURT. In view of the court's construction of the law at the time the motion to strike that portion of the petition, or the demurrer to that portion of the petition, was sustained, and objections to the offer now will be sustained and exceptions noted.

Mr. WILHOIT. In order to get it into the record I might say that the rents are sought to be recovered for the years 1904, ten years from that date.

The COURT. 1904 to 1914.

Mr. WILHOIT. The restriction period on this land expired in April, 1915. We have sought to recover from 1904 up until the time the restrictions went off.

The COURT. Are you gentlemen contending that the court is without jurisdiction to render judgment?

14 Mr. McCLUER. Why, certainly, your honor. And we claim this, if the court please: This suit was brought for possession of the premises, and as an incident to that possession to recover damages not on behalf of whoever might be the heirs of William Wea, deceased. The Government didn't content itself with that but it says in its petition that the legal heirs of William Wea are certain specific parties; that when he dies the land descended to them; and that they are entitled to possession and we are asking for possession for the benefit of those parties and damages that these specific parties mentioned are entitled to by reason of you having unlawfully kept them out of possession. They then charge that we are not in possession by authority of any of those specific parties. There is no allegation that we are not in possession under any one else except those specific ones. Now, if they fail in showing the heirship of those specific parties, their case fails because there is no showing that we are unlawfully in possession.

The COURT. Of course this is an action in which the plaintiff must prevail on the strength of his own title. Will the Government offer proof aside from the document which has been excluded as to the heirship of these parties?

Mr. WILHOIT. Just their answer. I have no oral testimony.

The COURT. Have you gentlemen any proof you wish to offer, or do you stand on the case as made b ythe Government?

Mr. WILHOIT. If your honor please, I would like to have this marked "Government's Exhibit No. 2." We desire to offer in evidence, defendant's amended answer, marked "Filed Mar. 16, 1917," and specifically paragraph 3 of that answer, which is as follows: "These defendants further answering allege that they are rightfully in possession of the said premises under and by virtue of the authority of the real heirs of the said William Wea, deceased, viz, by deeds executed and delivered to the defendant Bowling by Charles Stanley, Orilla Keno Mohawk, and Jessie Rice, made and delivered subsequent to April 5th, 1915."

The COURT. That allegation wouldn't be any item of proof, would it?

Mr. WILHOIT. That would show this, your honor; that would show this: Your honor has decided it would be necessary for us to show for whom we bring this suit. That shows we did bring it for at least one of the heirs mentioned in the petition.

15 The COURT. Yes, that is true, but I have held against your contention that the finding of the Secretary of the Interior as to heirship in this case establishes the heirship. Now, that being out of the record, it will be necessary for you to establish by proof here the right of the person, or persons, for whom you proceed as an heir.

Mr. WILHOIT. That is the purpose, because they have admitted that Stanley is one of the heirs.

Mr. McCLUER. No, Rice.

Mr. WILHOIT. Rice, one of the persons named in this answer, is admitted to be an heir of Jesse Rice or William Wea.

The COURT. Admitted where?

Mr. WILHOIT. In their answer.

The COURT. Is this objected to?

Mr. McCLUER. Yes, sir, entirely immaterial; there is no showing that that claim was based on the allegation that they had any interest when this suit was brought or that there was no change of heirship. And there is no showing of what took place between the time. That wouldn't be sufficient basis for the court to enter judgment.

The COURT. Jesse Rice was the one named in your petition?

Mr. WILHOIT. Jesse Rice is one of the heirs mentioned in the petition.

The COURT. Well, I will admit it for what it is worth.

Mr. WILHOIT. That is the Government's proof, if the court please.

Mr. MCCLUER. In answer to that—I don't know as it will have any bearing—we desire to introduce into evidence the two deeds referred to—one from Charles Stanley and wife, and Orilla Keno Mohawk, as of date November 8th, 1915; and the other from Jesse Rice to George E. Bowling conveying this property, dated the 20th of October, 1915. And the conveyance of this property with them in possession would have released them. These are the original deeds.

The COURT. Is it admitted that those are genuine documents?

Mr. WILHOIT. I haven't seen them.

The COURT. The notary seal and acknowledgment and recorder's stamp.

Mr. WILHOIT. We would like to object because they are incompetent, irrelevant, and immaterial, and for the further reason the only question in this case now is the question of rents and profits. These deeds were taken after the restriction period came on.

16 Mr. MCCLUER. They were put in only in response to their statements in the answer. The only fact that it does prove is that we were in possession and that is all it does amount to. If it should turn out that they had any interest, we bought that interest.

The COURT. Well, I will admit it.

Mr. WILHOIT. We except.

The COURT. Any further proof?

Mr. MCCLUER. I think not, your honor. It is not necessary for us to prove our title under these deeds.

The COURT. Well, that is for you gentlemen to determine. I am ready to hear you if you have gotten all your proof in on both sides.

Mr. MCCLUER. Defendants rest, your honor.

The COURT. I suppose that is all the proof there is in the case, isn't it?

Mr. WILHOIT. Yes, sir; that is all, all we have.

Gov. Ex. No. 1—2264—CTD. 3-5-18.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, May 31, 1917.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

[SEAL.] FE

E. B. MERITT,
Assistant Commissioner.

THE OFFICE OF THE SECRETARY.

Approved: It appears from the evidence adduced in this case that the heirs to the estate of William Wea, deceased Peoria allottee No. 103, and their respective shares are as follows:

Elwood Greer, husband of subsequently deceased great granddaughter of predeceased sister of predeceased grandfather ..... 1/12 or 30/360
Nancy Beaver Farris, great granddaughter of predeceased sister of predeceased grandfather ..... 1/24 or 15/360
17 Frank Beaver, great grandson of predeceased sister of predeceased grandfather 15/360
Thomas Peckham, grandson of predeceased sister of predeceased grandfather 60/360
Asa Froman, great great great grandson of predeceased sister of predeceased grandfather 6/360
Mary Froman, great great great granddaughter of predeceased sister of predeceased grandfather 6/360
Lizzie Froman, great great great granddaughter of predeceased sister of predeceased grandfather 6/360
Guy Froman, great great great grandson of predeceased sister of predeceased grandfather 6/360
Ozetta Froman, great great great granddaughter of sister of predeceased grandfather 6/360
Amos Eddy, great great great grandson of predeceased sister of predeceased grandfather ..... 1/24 or 15/360
Edna King, nee Eddy, great great great granddaughter of predeceased sister of predeceased grandfather 15/360
James Thompson, son of predeceased brother of predeceased mother ..... 1/12 or 30/360
I-ot-shuck or Jesse Rice, grandson of predeceased brother of predeceased mother 30/360
M-zhick-te-no, son of predeceased sister of predeceased mother 60/360
Shawque Tapsee, grandson of predeceased sister of predeceased mother ..... 1/18 or 20/360

LH-63457 H23

Elwood Greer, husband of subsequently deceased great granddaughter of predeceased sister of predeceased grandfather ..... 1/12 or 30/360
Nancy Beaver Farris, great granddaughter of predeceased sister of predeceased grandfather ..... 1/24 or 15/360
Frank Beaver, great grandson of predeceased sister of predeceased grandfather 15/360
Thomas Peckham, grandson of predeceased sister of predeceased sister of predeceased grandfather 15/360
Asa Froman, great great great grandson of predeceased sister of predeceased grandfather 15/360

LH-63457 H23

Op-tuck-quick Tapsee, grandson of predeceased sister of predeceased mother 20/360
18 Wah-sah-quah Tapsee, granddaughter of predeceased sister of predeceased mother 20/360

Inasmuch as this land was held under a restricted deed, no fee is to be collected for this determination.

(Signed) B. SWEENEY,
Assistant Secretary.

7, VAR-18
Inc. 7332.
LH-63457

H24.

Gov. Ex. No. 2—No. 2264—CTD 3-5-18.

In the United States District Court for the Eastern District of Oklahoma. United States of America, plaintiff, v. George E. Bowling, Francis McMasters, and the Miami Investment Company, a corporation, defendants.—No. 2264–L.

Defendant's answer.

Now at this day comes the above-named defendants and admit that they are in possession of the land mentioned in plaintiff's petition; and further admit that the said land was allotted under and by virtue of an act of Congress approved March 2, 1889, to one William Wea, deceased; and these defendants deny each and every other allegation in plaintiff's said petition contained.

These defendants specifically deny that the parties mentioned in plaintiff's petition and for whose use and benefit this suit is alleged to have been brought have or had the relationship mentioned in plaintiff's petition or any relationship whatever to the said allottee William Wea, deceased; and also deny that said parties are the heirs of any of the heirs of the said William Wea, deceased, or that any one of them is or was an heir of the said William Wea, deceased, or have or had any interest in the land mentioned in plaintiff's petition in any manner whatever.

These defendants further*ing* answering allege that they are rightfully in possession of the said premises under and by virtue of the authority of the real heirs of the said William Wea, deceased, viz, by deeds executed and delivered to the defendant Bowling by Charles Stanley, Orilla Keno Mohawk, and Jesse Rice, made and delivered subsequent to April 5th, 1915;

These defendants further answering allege that all of the restrictions contained in the original patent issued in this case to
19 William Wea, deceased, expired on the 5th day of April, 1915, and that therefore the United States of America does not have the right to recover possession of the land involved in this suit either on behalf of itself or for the parties mentioned in the petition or for any other party whatever; and these defendant– further answering deny that the Government of the United States has the right to further prosecute this suit for damages for any alleged wrongful withholding of the possession of the said premises by reason of the fact that all limitations on the right to convey said premises in fee simple expired on April 5, 1915, and a cause of action, if any exists, is now vested in the heirs of William Wea, deceased, or their assigns.

And defendants having fully answered ask to be discharged with their costs herein expended.

(Signed) HALBERT H. McCLUER,
ROLAND HUGHES,
Attorneys for Defendants.

(Endorsed:) No. 2264–L. In the United States District Court for the Eastern District of Oklahoma. United States of America, plaintiff, vs. George E. Bowling, Francis McMasters, and the Miami Investment Company, a corporation, defendants. Defendant's answer. Original. Filed Mar. 16, 1917, R. P. Harrison, clerk, U. S. District Court. Roland Hughes, H. H. McCluer, attys. for defendants.

(Form 12.) Beacon Print, Miami, Okla.

Quitclaim deed.

This indenture, made this 8th day of November, in the year A. D. 1905, between Charles Stanley, Etta Stanley, his wife, and also Orilla Keno Mohawk, a single and unmarried person, parties of the first part, and George E. Bowling of Kansas City, Missouri, party of the second part.

Witnesseth, That the said parties of the first part in consideration of the sum of one (1) dollar and other valuable considerations to them duly paid, the receipt whereof is hereby acknowledged, to hereby quitclaim, grant, bargain, sell, and convey unto the said part– of the second part, and to his heirs and assigns forever, all of our right, title, interest, and estate, both at law and in equity, of, in, and to the following-described real estate situate in the county of Ottawa and State of Oklahoma, to wit: The north half of the north-east quarter and lots Nos. three (3) and four (4) of section twenty-five (25), and lot one (1) of section twenty-seven (27), township twenty-eight (28) north, range twenty-two (22) east, and lots Nos. one (1) and two (2) of section thirty (30), township twenty-eight (28) north, range twenty-three east, of the Indian meridian, containing in the aggregate 198.88 acres, together with all and singular the hereditaments and appurtenances thereto belonging. To have and to hold the above-granted premises unto the said party of the second part his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands the day and year first above written.

(Signed) CHARLES STANLEY.
ETTA STANLEY.
ORILLA KENO MOHAWK (x her mark).

Signed, sealed, and delivered in the presence of—

(Signed) HENRY KENO.
MARIT BRAGG.

(Instrument bears a cancelled one dollar documentary stamp.)

STATE OF OKLAHOMA, *County of Ottawa, ss:*

Before me, W. I. Cowan, a notary public in and for said county and State, on this 8th day of Nov., 1915, personally appeared Chas. Stanley and Etta Stanley, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth.

(Signed) W. I. COWAN, *Notary Public.* [SEAL.]

My commission expires Feb. 9th, 1919.

STATE OF OKLAHOMA, *County of Ottawa, ss:*

Before me, W. I. Cowan, a notary public within and for said county and State, on this 8th day of Nov., 1915, personally appeared Orilla Keno Mohawk and ----------, to me known to be the identical person who executed the within and foregoing instrument, by her mark in my presence and in the presence of Henry Keno and Etta Stanley as witnesses, and acknowledged to me that she executed the same as her free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth.

(Signed) W. I. COWAN, *Notary Public.* [SEAL.]

My commission expires Feb. 9, 1919.

21 (Endorsed:) 1579 48/239, 11/8/15; N2 NE4 & lots 3-4-25; lot 1, 27-28-22; lots 1-2, 30-28-23. Quitclaim deed from Charles Stanley and wife & Orilla Keno Mohawk, to George E. Bowling. State of Oklahoma, county of Ottawa, ss: This instrument filed for record in the office of the county clerk, at Miami, Ottawa County, Oklahoma, Mar. 15, 1916, 8 a. m., and recorded in Book 48, page 239. W. P. McCullough, county clerk; by J. C. Briggs, deputy. 125.

Form No. 15.

Printed and for sale by G. S. Demaree, 619 Walnut St., Kansas City, Mo., Home 6722 Main.

Quitclaim deed.

This indenture, made on the 20th day of October, A. D. one thousand nine hundred and fifteen, by and between Jessie Rice, whose Indian name is I-Ot-Shuck, grandson of Shaw-que, and son of We-Kmaw-be-tuck (father), and Me-no-ne-qua (mother), of the county of Potawatomie, State of Oklahoma, party of the first part, and George E. Bowling, of the county of Jackson, State of Missouri, party of the second part.

Witnesseth, that said party of the first part, in consideration of the sum of one dollar, and other valuable considerations, to him paid by the said party of the second part (the receipt of which is hereby acknowledged), do ---- by these presents, remise, release, and forever quitclaim unto the said party of the second part, the following described lots, tracts, or parcels of land, lying, being, and situate in the county of Ottawa, and State of Oklahoma, to wit: The north half of the northeast quarter and lots Nos. three (3) and four (4) of section twenty-five (25), and lot one (1) of section twenty-seven (27), township twenty-eight (28) north, range twenty-two (22) east, and lots Nos. one (1) and two (2) of section thirty (30), township twenty-eight (28) north, range twenty-three (23) east, of the Indian Meridian, containing in the aggregate 198.88 acres. To have and to hold the same, with all the rights, immunities, privileges, and appurtenances thereto belonging unto said party of the second part, and unto his heirs and assigns forever, so that neither the said party of the first part, nor his heirs, nor any other person or persons for him or in his name or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises or any part there-
22 of, but they and each of them shall, by these presents, be excluded and forever barred.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year above written.

(Signed) JESSEE RICE OR I-OT-SHUCK. [SEAL.]
---------- [SEAL.]
---------- [SEAL.]
---------- [SEAL.]

Signed, sealed, and delivered in presence of—

(Signed) HARRY M. REIST.
JOSEPH BAKER.

(Document bears two stamped 25c documentary stamps.)

STATE OF KANSAS, *County of Jackson, ss:*

On this 20 day of October, 1915, before me, F. C. Poole, a notary public in and for said county and State, personally appeared Jesse Rice, whose Indian name is I-ot-shuck, to me known to be the identical person described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth. and the said Jesse Rice, otherwise I-ot-shuck, further declared himself to be single and unmarried.

In testimony whereof I have hereunto set my hand and affixed my official seal at my office, in said county, the day and year first above written. My term expires June 7th, 1919.

[SEAL.] (Signed) F. C. POOLE,
Notary Public in and for said county and State.

(Endorsed:) 1629 46/414, 10-20-15; N2 NE4 & L-3-4, 25; L-1, 27-28-22; L-1-2, 30-28-23. Quitclaim deed from Jesse Rice, or

I-ot-shuck, to George E. Bowling. State of Oklahoma, county of Ottawa, ss: This instrument filed for record in the office of county clerk, at Miami, Ottawa County, Oklahoma, Dec. 23, 1915, 8 a. m., and recorded in Book 46, page 414. W. P. McCullough, county clerk; by J. C. Briggs, deputy.

And thereupon the court at the conclusion of testimony did, on said 5th day of March, 1918, render judgment in favor of the defendants and against the plaintiff.

We, the undersigned attorneys of record, for the defendants,
23 in the within and foregoing action, hereby accept service of the within and foregoing bill of exceptions this the 10th day of August, 1918.

We agree, as such attorneys, that the within and foregoing bill of exceptions may be presented to the Honorable Ralph E. Campbell, judge of the United States District Court for the Eastern District of Oklahoma, for the purpose of having the same signed and settled by the said judge on the 17th day of August, 1918, at Muskogee, in said district.

VERN. E. THOMPSON,
Attorneys for Defendants.

And now, in furtherance of justice and that right may be done, the plaintiff presents the within and foregoing as a bill of exceptions in this cause, and prays that the same may be settled, allowed, certified, and signed by the judge as provided by law.

W. P. McGINNIS,
United States Atty.
J. C. WILHOIT,
Special Assistant United States Attorney.

In the District Court of the United States for the Eastern District of Oklahoma. United States of America, plaintiff, vs. George E. Bowling et al., defendants.—No. 2264, Law.

And now upon this the 17th day of August, 1918, the same being a day within the time heretofore by the court allowed for the preparation, settling, and signing of the bill of exceptions herein, comes the plaintiff by its attorney and prays the court that the within and foregoing may be settled, signed, and ordered filed as their bill of exceptions herein.

And the court, upon said date, having considered the above and foregoing bill of exceptions, it is by the court ordered that said bill of exceptions be, and the same hereby is, settled, signed, and allowed as a true and correct bill of exceptions herein and the same is ordered filed by the clerk of the court and made a part of the record herein.

RALPH E. CAMPBELL, *District Judge.*

(Endorsed:) Filed Aug. 17, 1918. R. P. Harrison, clerk U. S. District Court, Eastern District of Oklahoma.

24 And, to wit, on the 17th day of August, A. D. 1918, the plaintiff filed petition for writ of error, together with its assignment of errors, which petition for writ of error was allowed by the court. Said petition for writ of error, assignment of errors, and order allowing writ of error are in words and figures as follows:

Petition for writ of error.

The above-named plaintiff, the United States of America, conceiving itself aggrieved by the judgment entered on the 5th day of March, 1918, in the above-entitled cause, hereby prays the court for a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and that all further proceedings of this court under the judgment rendered herein be suspended and stayed until a determination of said writ of error by the Circuit Court of Appeals for the Eighth Circuit; and that the transcript of the records and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to said Circuit Court of Appeals for the Eighth Circuit.

Your petitioner shows to the court that error was committed to its prejudice by this court in its judgment in the above-entitled cause, as will more in detail appear from the assignment of errors filed with this petition.

W. P. McGINNIS,
United States Attorney.
J. C. WILHOIT,
Special Assistant United States Attorney.

(Endorsed:) Filed Aug. 17, 1918. R. P. Harrison, clerk U. S. District Court, Eastern District of Oklahoma.

Assignment of errors.

Comes now the plaintiff, United States of America, by W. P. McGinnis, United States attorney for the Eastern District of Oklahoma, and files the following assignment of errors upon which it will rely in the prosecution of the writ of error in the above-entitled cause.

I.

The court erred in sustaining the motion of the defendants to strike certain portions of plaintiff's amended petition and in
25 striking said portions of said amended petition, to which action of the court the said plaintiff excepted at the time. The portions of said amended petition so ordered stricken being as follows, to wit:

"And said persons as set out in Exhibit B were duly declared the heirs at law of William Wea by the Secretary of the Interior on October 19, 1914, pursuant to the acts of Congress with reference thereto."

II.

Because the court erred in refusing to permit competent testimony offered by the plaintiff herein, to wit, certified copy of the findings of the Secretary of the Interior, to be introduced in evidence, to which action of the court said plaintiff excepted at the time.

III.

Because the court erred in rendering judgment against the plaintiff and in favor of said defendants.

IV.

Because the judgment rendered by the court herein is contrary to law.

Wherefore, said plaintiff prays the judgment of the District Court of the United States for the Eastern District of Oklahoma be reversed and said district court be directed to grant a new trial of said cause.

W. P. McGinnis,
United States Attorney.
J. C. Wilhoit,
Special Assistant United States Attorney.

(Endorsed:) Filed Aug. 17, 1918. R. P. Harrison, clerk U. S. District of Oklahoma, Eastern District of Oklahoma.

Order allowing writ of error.

Upon motion of W. P. McGinnis, Esquire, United States attorney for the Eastern District of Oklahoma, attorney for plaintiff, and upon filing a petition for writ of error and the assignments of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the Circuit Court of Appeals for the Eighth Circuit the judgment heretofore entered herein.

Done this 17th day of August, 1918.

Ralph E. Campbell, *Judge.*

26 (Endorsed:) Filed Aug. 17, 1918. R. P. Harrison, clerk U. S. District Court, Eastern District of Oklahoma.

Writ of error.

United States of America, *ss:*

The President of the United States of America to the honorable judges of the District Court for the Eastern District of Oklahoma, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, at the March term, 1918, thereof, between United States of

America, plaintiff, and George E. Bowling, Francis McMasters, and Miami Investment Company, a corporation, defendants, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the 16th day of October, 1918, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 17th day of August, in the year of our Lord one thousand nine hundred eighteen.

Issued at office in Muskogee with the seal of the United States District Court for Eastern Dist. of Okla. and dated as aforesaid.

R. P. HARRISON,
Clerk of District Court.

[SEAL.] By H. E. BOUDINOT, *Deputy.*

Allowed by—RALPH E. CAMPBELL,
U. S. District Judge.

27 UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the United States District Court for the Eastern District of Oklahoma.

R. P. HARRISON,
Clerk of District Court.

[SEAL.] By H. E. BOUDINOT, *Deputy.*

Citation.

United States of America to George E. Bowling, Francis McMasters, & Miami Investment Co., a corporation, greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the day

this citation bears date, pursuant to (1) writ of error filed in the clerk's office of the (2) district court wherein United States of America is (3) plaintiff in error and you are (4) defendants in error, to show cause, if any there be, why the (5) judgment rendered against the said (6) pltf. in error as in said (7) writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Ralph E. Campbell, judge of district court, this 17 day of August, A. D. 1918.

RALPH E. CAMPBELL,
Judge of District Court.

Notes.—(1) Insert (a writ of error) or (an appeal allowed and). (2) Insert name of court to which writ of error is addressed, or from which appeal is allowed. (3) Insert plaintiff in error or appellant. (4) Insert defendant in error or appellee. (5) Insert judgment or decree. (6) Insert plaintiff in error or appellant. (7) Insert writ of error or appeal.

Service of the within and foregoing citation and receipt of a copy thereof is hereby acknowledged this 19 day of August, 1918.

VERN E. THOMPSON,
Attorney for Defendants.

28 *Notice and Agreement as to Contents of Printed Transcript.*

To George E. Bowling, Francis McMasters, & Miami Investment Company, a corporation:

You are hereby notified in accordance with rule B, division 1, of the rules of this court that the United States of America hereby elects to file a printed transcript of the record in said case in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to the provisions of the act of Congress of February 13, 1911.

You are also hereby notified that pursuant to rule C, division 1, of the aforesaid rules the said United States of America will include in the printed transcript herein to be filed in the United States Circuit Court of Appeals for the Eighth Circuit, the following parts of the record in the above-entitled cause, to wit:

(1) Amended petition of plaintiff.

(2) Motion of George E. Bowling and Miami Investment Company to strike a portion of the amended petition.

(3) Demurrer of defendant Francis McMasters.

(4) Order of court sustaining motion to strike and exceptions of plaintiff.

(5) Order of court overruling demurrer and exceptions.

(6) Answer of defendants.

(7) Motion to make defendants' answer more definite and certain.

(8) Order of court sustaining motion to make amended answer more definite and certain and exceptions.

(9) Amended answer of defendants (filed answer).
(10) Reply of plaintiff.
(11) Judgment of court and order granting time to serve and file bill of exceptions.
(12) Order of court extending time to serve and file bill of exceptions.
(13) Bill of exceptions.
(14) Order settling bill of exceptions.
(15) Petition for writ of error.
(16) Assignments of error.
(17) Order allowing writ of error.
(18) Writ of error and return thereon.
(19) Citation.
29 (20) Notice and agreement as to contents of printed transcript;
(21) Certificate of clerk.

W. P. McGINNIS,
United States Attorney.
J. C. WILHOIT,
Special Assistant United States Attorney.

Acknowledgment of service of notice.

George E. Bowling, Francis McMasters, and Miami Investment Company, a corporation, hereby acknowledge receipt of a copy of the above and foregoing notice of election of plaintiff, United States of America, to file in the United States Circuit Court of Appeals for the Eighth Circuit a printed transcript of the record in said case; and also of the foregoing statement of the parts of the record in said cause which said plaintiff will include in its printed transcript herein.

Dated this 27 day of August, 1918.

VERN E. THOMPSON,
Attorney for Defendants.

(Endorsed:) Filed Sept. 2, 1918. R. P. Harrison, clerk U. S. District Court, Eastern District of Oklahoma.

Certificate of clerk.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I, R. P. Harrison, clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true, and correct transcript of so much of the record in the case of United States of America v. George E. Bowling et al., No. 2264, as was ordered by præcipe of counsel herein to be prepared and authenticated, as the same appears from the records in my office.

I further certify that the writ of error and citation attached hereto, and returned herewith, are the original writ of error and citation issued in this cause.

In testimony whereof I have hereunto set my hand and
30 affixed the seal of said court at my office in the city of Muskogee, this 13th day of September, A. D. 1918.

R. P. HARRISON, *Clerk.*

[SEAL.] By H. E. BOUDINOT, *Deputy.*

31 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

Appearance of Mr. W. P. McGinnis and Mr. J. C. Wilhoit as counsel for plaintiff in error.

United States Circuit Court of Appeals, Eighth Circuit. No. 5288. United States of America, plaintiff in error, vs. George E. Bowling et al.

The clerk will enter my appearance as counsel for the plaintiff in error.

W. P. MCGINNIS.
J. C. WILHOIT.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 9, 1918.

Appearance of counsel for defendants in error.

The clerk will enter my appearance as counsel for the defendants in error.

H. H. MCCLUER,
1208 Commerce Bldg., Kansas City, Mo.
ROLAND HUGHES,
Kansas City, Mo.
VERN *E.* THOMPSON,
410 James Bldg., Miami, Okla.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 21, 1918.

32 *Appearance of Mr. Cliff V. Peery as counsel for plaintiff in error.*

The clerk will enter my appearance as counsel for the plaintiff in error.

CLIFF V. PEERY,
Muskogee, Okla., Asst. U. S. Atty.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 27, 1919.

Order of submission.

May Term, 1919. Tuesday, June 3, 1919.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Cliff V. Peery, assistant United States attorney, for plaintiff in error, continued by Mr. Halbert H. McCluer and Mr. Roland Hughes for defendants in error, and concluded by Mr. Cliff V. Peery for plaintiff in error.

Thereupon this cause was submitted to the court on the transcript of the record from said district court and the briefs of counsel filed herein.

33 *Opinion.*

United States Circuit Court of Appeals, Eighth Circuit.

No. 5288.—December term, A. D. 1919.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	In error to the District Court of the United States for the Eastern District of Oklahoma.
vs.	
GEORGE E. BOWLING ET AL., DEFENDANTS IN ERROR.	

Mr. Cliff V. Peery, assistant United States attorney (Mr. W. P. McGinnis, United States attorney, and Mr. J. C. Wilhoit, special assistant to the United States attorney, were with him on the brief), for plaintiff in error.

Mr. Halbert H. McCluer and Mr. Roland Hughes (Mr. Vern E. Thompson was with them on the brief) for defendants in error.

Before SANBORN, circuit judge, and MUNGER and YOUMANS, district judges.

MUNGER, district judge, delivered the opinion of the court.

From a judgment in favor of the defendants in a suit in ejectment the plaintiff has prosecuted this error proceeding. The parties waived a jury and tried the case to the court. There was a general finding in favor of the defendants and a judgment of dismissal. The land in controversy was patented on April 8, 1890, to Pe-te-lon-o-zah, also known as William Wea, a member of the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw Tribes of Indians. The patent contained a restrictive provision that the lands should not be alienated nor subject to levy, sale, taxation, or forfeiture for twenty-five years. The effect of this provision in restraining alienation of this tract of land was stated by the Supreme Court in United
34 States v. Bowling, 233 U. S. 528. The act of Congress of February 8, 1887 (24 Stat. 388), provided generally for allot-

ments of land in severalty to the Indians but contained an express exception that it did not apply to the lands of this confederated tribe. On March 2, 1889, an act of Congress (25 Stat. 1013) was passed extending the provisions of the act of 1887 to this tribe, but subject to some exceptions. The act of 1887 had provided for the issuance of patents to the allottees, and that the patents should be of the legal effect and should declare that the United States would hold the allotted land in trust for the allottee for twenty-five years and that at the expiration of that time, the United States would convey the land by patent to the Indian or his heirs, in fee. The act of 1889 authorized allotments to members of this confederated tribe and also provided as follows:

"The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause a patent to issue to each and every person so entitled, for his or her allotment, and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and shall also recite that such land so allotted and patented is not subject to levy, sale, taxation, or forfeiture for a like period of years, and that any contract or agreement to sell or convey such land or allotments so patented entered into before the expiration of said term of years shall be absolutely null and void."

The act also contained a provision that any act or part of an act of Congress theretofore passed that conflicted with the later act, either as to land or money, was thereby repealed.

William Wea, after receiving his patent under the act of 1889, died on January 23, 1894. The petition in this case alleged that the action was brought on behalf of the United States and of the heirs of William Wea and that certain persons named in Exhibit B, attached to the petition, were duly declared to be the heirs at law of William Wea by the Secretary of the Interior on October 19, 1914, pur-
35 suant to the acts of Congress with reference thereto. This statement of the finding of heirship by the Secretary of the Interior was stricken from the petition on defendants' objection and an exception was saved. At the trial the plaintiff offered in evidence a copy of a departmental record in the office of the Secretary of the Interior, showing that the Secretary had found the heirs of William Wea to be the same persons as those who had been named in Exhibit B attached to plaintiff's petition. On objection, this was excluded as immaterial and plaintiff excepted to the ruling.

By assignments of error based upon these rulings the question is presented, whether the Secretary of the Interior had authority to make a finding of the rightful heirs of William Wea, controlling the court in the trial of this case. The authority of the Secretary

is asserted because of the language of the act of Congress of June 25, 1910 (36 Stat. 855), as follows:

"When any Indian to whom an allotment of and has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

This statute did not authorize the finding of the Secretary of the Interior in this case, because, before its enactment, a fee simple patent had been issued to William Wea (Libby v. Clark, 118 U. S. 250), although it was subject to the restrictions on alienation therein contained. The statute by its terms as quoted and as appears from its context applied only to cases where allotments were made and the titles were withheld in trust, to be followed by the issuance of a fee simple patent at the end of the trust period. In other clauses of the same section, the Secretary was given discretion to issue a patent in fee to the heirs of the allottee, if he decided them competent to manage their own affairs or to issue patents in fee upon partition of the lands between the heirs, and by the language of the following section an allottee was given the right to dispose of the allotment by will, prior to the expiration of the trust period and prior to the issue of a fee simple patent.

36 The claim is also made that the Secretary of the Interior had the sole authority to determine who were the heirs of William Wea, regardless of this statute, because the United States has retained the general control of controversies over the title and possession of allotments. (Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401; McKay v. Kalyton, 204 U. S. 458.)

It must be conceded that the Secretary has the power to ascertain the heirs of a deceased Indian, when such action is essential to an execution of his powers, such as the issuance of a final patent to the heirs or the approval of a conveyance by the heirs, as required by statute. (Egan v. McDonald, 246 U. S. 227; Hallowell v. Commons, 239 U. S. 506; Tiger v. Western Investment Co., 221 U. S. 286; Oregon v. Hitchcock, 202 U. S. 60.) But in this case the land had been patented to William Wea, and under the provisions of section five of the act of February 8, 1887, the laws of the State of Kansas regulating the descent and partition of land were made applicable. Wea had died in 1894, and the descent of these lands had been fixed at that time. The title of the heirs was not dependent upon any action of the Secretary of the Interior because Congress had released its control over the descent or partition of these lands. The ordinary judicial processes of declaring the heirs or of partitioning the land amongst them thereafter applied. (Beam v. United States, 162 Fed. 260; United States v. Park Land Co., 188 Fed. 383;

see also Finley v. Abner, 129 Fed. 734.) There was therefore no error in striking the exhibit from the plaintiff's petition, nor in excluding it as evidence.

There are two other assignments of error. One is, that the judgment rendered is contrary to law, but this is too general and indefinite to be considered. (Chicago, M. & St. P. Ry. Co. v. Anderson, 168 Fed. 901; Ireton v. Pennsylvania Co., 185 Fed. 84; Craig v. Door, 145 Fed. 307; Chicago Terminal Transfer R. Co. v. Bomberger, 130 Fed. 884; Northern Central Coal Co. v. Barrowman, 246 Fed. 906.) The other assignment, that the court erred in rendering judgment in favor of the defendants is also too general. (Western Union Telegraph Co. v. Winland, 182 Fed. 493; Choctaw, O. & G. R. Co. v. Jackson, 192 Fed. 792; Felker v. First Nat. Bank, 196 Fed. 200; Philadelphia Casualty Co. v. Fechheimer, 220
37 Fed. 401; Fisher Mach. Works Co. v. Dougherty, 231 Fed. 910; Deering Harvester Co. v. Kelley, 103 Fed. 261; The Myrtle M. Ross, 160 Fed. 19.)

The basis for these contentions, as disclosed by the argument and briefs, is that the evidence does not support the general finding of the court. The record does not show that there was any request of the plaintiff for a finding of facts or for a declaration of law in its favor, and as a trial by jury was waived, the sufficiency of the evidence is a question that can not now be raised, even if a proper assignment of error had been made to state the question. (Wear v. Imperial Window Glass Co., 224 Fed. 60; Chicago, M. & St. P. Ry. Co. v. George A. Hornel & Co., 240 Fed. 381, and cases cited.

The judgment of the trial court is

Affirmed.

Filed December 2, 1919.

38 *Judgment.*

United States Circuit Court of Appeals, Eighth Circuit. December term, 1919. Tuesday, December 2, 1919. United States of America, plaintiff in error, vs. George E. Bowling, Francis McMasters, and Miami Investment Company. No. 5288. In error to the District Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

DECEMBER 2, 1919.

Petition for writ of error from Supreme Court, U. S.

To the honorable judges of the United States Circuit Court of Appeals:

The above-named United States of America, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 2nd day of December, 1919, does hereby pray that writ of error issue herein to the Supreme Court of the United States; that
39 citation issue, as provided by law; and that a transcript of the records and proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such court in such cases made and provided.

Your petitioner files herewith its assignment of errors, setting forth the errors committed by this court, as your petitioner avers, upon which he will rely for reversal of the said decree.

ARCHIBALD BONDS,
United States Attorney,
PAUL PINSON,
Special Assistant to the Attorney General,
Attorneys for Plaintiff in Error.

Writ allowed this 2nd day of March, 1920.

WALTER H. SANBORN,
Senior U. S. Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 2, 1920.

Assignment of errors on writ of error from Supreme Court, U. S.

Come now the plaintiff in error, United States of America, and respectfully assert and show to this honorable court that in the decree of this court, rendered herein on, to wit, December 2, 1919, wherein and whereby was affirmed judgment of the United States District Court for the Eastern District of Oklahoma, entered therein on the 5th day of March, 1918, the following errors were committed by this honorable court, to the injury and prejudice of the plaintiff in error, to wit:

1. The court erred in affirming a judgment of the District
40 Court of the United States for the Eastern District of Oklahoma, denying to the plaintiff, United States of America, the right to institute suit and recover judgment against persons who had theretofore been in unlawful possession of the restricted allotment of William Wea, deceased, Peoria allottee No. 103.

2. The court erred in holding and concluding that the right of the United States of America to maintain such action was dependent in any sense upon the determination or proof of the persons who inherited the allotment of the said William Wea, deceased.

3. The court erred in holding and concluding that the determination of heirship by the Secretary of the Interior of the United States was incompetent and immaterial evidence in this cause.

4. The court erred in holding, concluding, and decreeing that the United States of America was without right, as a sovereign, to enforce the collection of rents and profits upon restricted land unlawfully held by the defendants, and to receive and hold such moneys for the benefit of the heirs of William Wea, deceased.

5. The court erred in holding, concluding, and decreeing that the United States of America, as a sovereign in its own right, was not authorized nor entitled to proceed in its courts to enforce, in the protection of William Wea and his heirs, its policy as affirmed by acts of Congress in that behalf enacted, and by the course of dealing of the United States of America, as a sovereign, toward the Indian tribes resident in the United States, and the individual members thereof, and particularly toward said Peoria tribe of Indians.

6. The court erred in holding and concluding, because after the institution of the suit herein the trust period expired which was prescribed by act of Congress of March 2, 1889, and evidenced by the provision in the patent to William Wea:

41 "That the said lands shall not be alienated nor subject to levy, sale, taxation, or forfeiture for a period of twenty-five years from the date hereof, and any contract or agreement to sell or convey said land before the expiration of said period shall be absolutely null and void,"

and because the defendants thereafter took certain deeds, the validity or force of which has been in no wise established, that therefore the plaintiff was without right to maintain an action to recover the rents and profits accruing during the period when the defendants held said allotment in violation of the act of Congress aforesaid and of the governmental policy toward the Indians.

7. The court erred in concluding and holding that the representation by the United States of America, plaintiff, of its wards, the heirs of William Wea, deceased, was incomplete and insufficient.

8. The court erred in concluding that the authority of the United States of America in its policy toward the Peoria Tribe and toward William Wea was confined to the enforcement of personal rights, and depended not upon the status of the land affected but the personal status of William Wea's heirs.

9. The court erred in concluding and holding that it was essential to the right of the plaintiff to recover that proof be made of the names of those who inherited from William Wea, deceased.

Wherefore plaintiff in error prays that such judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit made and entered on the 2nd day of December, 1919, and the decree and judgment of the District Court for the Eastern District of Oklahoma, made and entered on the 5th day of March, 1918, be re-

versed and that the Supreme Court of the United States of America render such judgment on the record in this cause as shall conform to the facts disclosed and the law applicable thereto.

ARCHIBALD BONDS,
United States Attorney,
42 PAUL PINSON,
Special Assistant to the Attorney General,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 2, 1920.

Order allowing writ of error from Supreme Court, U. S.

On motion of counsel for plaintiff in error herein it is hereby ordered that a writ of error to the Circuit Court of Appeals to review the decree heretofore filed and entered herein be and the same is hereby allowed.

Dated this 2nd day of March, 1920.

WALTER H. SANBORN,
Senior U. S. Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 2, 1920.

43 In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *vs.* GEORGE E. BOWLING, FRANCIS McMASTERS, AND THE Miami Investment Company, a corporation, defendants in error.	No. 5288.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable judges of the Eighth Circuit Court of Appeals, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals of the Eighth Circuit, before you, at the December, 1919, term thereof, between the United States of America, plaintiff in error, and George E. Bowling, Francis McMasters, and the Miami Investment Company, a corporation, defendants in error, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this
44 writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the Supreme Court of the United States, on or before the 1st day of April, 1920, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 2nd day of March, in the year of our Lord one thousand nine hundred twenty.

Issued at office in St. Louis, Missouri, with the seal of the Circuit Court of Appeals for the Eighth Circuit, and dated as aforesaid.

[SEAL.] E. E. KOCH,
Clerk of the Circuit Court of Appeals, Eighth Circuit.

Allowed by:

WALTER H. SANBORN,
Senior U. S. Circuit Judge, Eighth Circuit.

Return to writ.

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled cause, with all things concerning the same.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-third day of March, A. D. 1920.

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 5288. United States of America, plaintiff in error, vs. George E. Bowling et al. Writ of error from Supreme Court of the United States. Filed Mar. 2, 1920. E. E. Koch, clerk.

45 In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *vs.* GEORGE E. BOWLING, FRANCIS McMASTERS, AND THE Miami Investment Company, a corporation, defendants in error.	No. 5288.

Citation.

UNITED STATES OF AMERICA, *ss:*

To George E. Bowling, Francis McMasters, and the Miami Investment Company, a corporation, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to the writ of error filed in the clerk's office of the Circuit Court of Appeals for the Eighth Circuit, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said United States of America, plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Walter H. Sanborn, judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 2nd day of March, A. D. 1920.

WALTER H. SANBORN,
Senior U. S. Circuit Judge, Eighth Circuit.

46 In the United States Circuit Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, *vs.* GEORGE E. BOWLING, FRANCIS McMASTERS, AND THE Miami Investment Company, a corporation, defendants in error.	No. 5288.

Acknowledgment of service of citation on writ of error.

The undersigned, attorney of record for the defendants in error herein, hereby acknowledges the service upon him of the citation to appear in the Supreme Court of the United States, and the receipt of a copy of the said citation, this 5th day of March, A. D. 1920.

ROLAND HUGHES,
HALBERT H. McCLUER,
Attorney of Record for the Defendants in Error.

47 Service and receipt of copy of the citation issued in the case of United States of America vs. George E. Bowling et al., defendants in error, under a writ of error from the Supreme Court to the Circuit Court of Appeals for the Eighth Circuit, is hereby acknowledged this 17th day of March, 1920.

VERN E. THOMPSON,
Attorney for Defendants in Error.

(Endorsed:) In the United States Circuit Court of Appeals, Eighth Circuit. United States of America, plaintiff, vs. George E. Bowling, Francis McMasters, and the Miami Investment Company, a corporation, defendants. No. 5288. Filed Mar. 22, 1920. E. E. Koch, clerk. Citation.

48 *Clerk's certificate.*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, as prepared, printed, and certified by the clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the act of Congress approved February 13, 1911, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals, wherein the United States of America was plaintiff in error and George E. Bowling et al. were defendants in error, No. 5288, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original writ of error, with the clerk's return endorsed thereon, and the original citation, with acknowledgments of service endorsed thereon, are hereto attached and herewith returned.

I do further certify that on the third day of February, A. D. 1920, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the Eastern District of Oklahoma.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the

Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-third day of March, A. D. 1920.

[SEAL.] E. E. KOCH,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsement on cover:) File No. 27593. U. S. Circuit Court Appeals, 8th Circuit. Term No. 838. The United States of America, plaintiff in error, vs. George E. Bowling, Francis McMasters, and the Miami Investment Company. Filed March 29th, 1920. File No. 27593.

○

INDEX.

	Page.
Statement	1
Assignments of error	4
Argument:	
I. The Secretary of the Interior had jurisdiction to determine the heirs of the deceased Peoria allottee and his findings were conclusive	6
II. The United States in its own behalf was entitled to judgment for the stipulated rental value of the land while it was unlawfully occupied by defendants during the period of restriction	18
III. In any event, the United States was suing on behalf of Jesse Rice, a tribal Indian, one of the admitted heirs of William Wea, deceased, and was entitled to judgment for his proportionate part of the rental value of the land while unlawfully occupied	21

CITATIONS.

Statutes:	
Acts of February 8, 1887, 24 Stat. 388	8, 9
March 2, 1889, 25 Stat. 1013	2, 13
May 2, 1890, 26 Stat. 81	9
June 7, 1897, 30 Stat. 62	11
May 31, 1900, 31 Stat. 221	11
May 27, 1902, 32 Stat. 245	11
April 21, 1904, 33 Stat. 189	20
March 1, 1907, 34 Stat. 1015	12
June 25, 1910, 36 Stat. 855	12
February 14, 1913, 37 Stat. 678	16
August 1, 1914, 38 Stat. 582	15
May 18, 1916, 39 Stat. 123	16
March 2, 1917, 39 Stat. 969	16

Cases:

	Page.
Bowling v. *United States*, 233 U. S. 528	6, 19
Deming Inv. Co. v. *United States*, 224 U. S. 471	20
Goat v. *United States*, 224 U. S. 458	19
Hallowell v. *Commons*, 239 U. S. 506	9, 10
Heckman v. *United States*, 224 U. S. 413	19, 20
United States v. *Bowling*, 261 Fed. 657	4
United States v. *Tennessee & Coosa R. R. Co.*, 176 U. S. 242	18

Miscellaneous:

Reports Commissioner of Indian Affairs	16, 17
S. Rep. 519, 63rd Congress, 2d session	15

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, *Plaintiff in Error,*
v.
GEORGE E. BOWLING, FRANCIS MCMASTERS, *and* THE MIAMI INVESTMENT COMPANY.
No. 295.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The United States in its own behalf and on behalf of the heirs at law of William Wea, deceased Peoria allottee, filed an amended petition March 4, 1915 (R. 1), in the United States District Court for the eastern district of Oklahoma, against the defendants (who are defendants in error here), for recovery of the possession of 198.88 acres of land allotted to said William Wea as his distributive share of the lands belonging to the tribe in the Indian Territory, and for the recovery of the reasonable annual rental value of said land during the time that it was alleged to have been unlawfully occupied by defendants. A patent in fee with a twenty-five-year

restriction against alienation was issued to the deceased allottee on April 8, 1890 (R. 3), under the provisions of the Act of March 2, 1889, c. 422, 25 Stat. 1013.

The amended petition alleges that the allottee died intestate on or about the 23rd day of January, 1894, seized of the real estate described, leaving as his sole heirs at law 17 persons enumerated in Exhibit B (R. 4), all of whom were members of the confederated tribes of Indians, still under the supervision and control of the Quapaw Indian Agency in Oklahoma,

> and said persons as set out in Exhibit B were duly declared the heirs at law of William Wea by the Secretary of the Interior on October 19, 1914, pursuant to the Acts of Congress with reference thereto.

On motion by defendants (R. 5) the above allegation of the finding by the Secretary of the Interior that the persons named in Exhibit B were the heirs at law of William Wea, was stricken from the petition (R. 7). The defendant McMasters demurred to the petition (R. 6) because, first, it did not state facts sufficient to constitute a cause of action; second, the United States had no legal capacity to maintain this suit; and third, the petition showed on its face that plaintiff was not entitled to the relief sought, had no right to the possession of the premises, and no legal right to maintain the suit for and on behalf of the parties mentioned and designated by the Secretary of the Interior in the petition as being entitled to possession of the land.

The District Court on March 16, 1916, filing an opinion which is printed as an appendix to this brief, overruled this demurrer (R. 7), and on April 12, 1916, defendants answered (R. 7) denying that the parties mentioned in plaintiff's petition, for whose use and benefit the suit is alleged to have been brought, had any relationship whatever with the allottee William Wea, deceased, or that the parties, or any of them, are the heirs of William Wea, deceased, and alleged that the restrictions contained in the original patent issued to the deceased Indian expired on the fifth day of April, 1915, and that therefore the United States had no right to recover possession of the land, either on its own behalf or on behalf of the parties mentioned in the petition, and had no right to further prosecute the suit for damages for the wrongful withholding of possession of the premises, the cause of action, if any, existing since April 5, 1915, being vested in the heirs of William Wea, deceased, or their assigns.

Upon motion (R. 8) defendants were required to make their answer more definite and certain (R. 9). An amended answer was filed (R. 15) in which they alleged that they are rightfully in possession of the premises under and by virture of authority of the real heirs of the deceased Indian by deeds executed and delivered to defendant Bowling by Charles Stanley, Orilla Keno Mohawk and Jesse Rice, subsequent to April 5, 1915.

The evidence upon which the case was heard is stipulated (R. 10–13). From this stipulation it ap-

pears that the agreed rental value of the land for the ten years it is alleged to have been unlawfully occupied by defendants was $2500.00. The Government offered in evidence (R. 11) a certified copy of the findings of the Secretary of the Interior determining the heirs of William Wea, but defendants' objection to this offer was sustained and the Government excepted.

The Government also offered in evidence (R. 12) paragraph 3 of defendants' amended answer, showing that Jesse Rice, one of the heirs as found by the Secretary of the Interior, was admitted by said answer to be an heir of the deceased allottee, William Wea. Defendants offered in evidence (R. 13) two deeds, one from Charles Stanley and wife and Orilla Keno Mohawk to George E. Bowling, dated and acknowledged November 8, 1915 (R. 16), the other from Jesse Rice to George E. Bowling, dated and acknowledged October 20, 1915 (R. 17).

The court entered judgment for defendants (R. 9) and the Circuit Court of Appeals affirmed that judgment (R. 29). Opinion, C. C. A., R. 26, 261 Fed. 657.

ASSIGNMENTS OF ERROR.

We rely upon the assignments of error in the Circuit Court of Appeals as embodied in the following assignments in this court (R. 30, 31):

> 1. The court erred in affirming a judgment of the District Court of the United States for the eastern district of Oklahoma, denying to the plaintiff, United States of America, the right to institute suit and recover judgment

against persons who had theretofore been in unlawful possession of the restricted allotment of William Wea, deceased, Peoria allottee No. 103.

2. The court erred in holding and concluding that the right of the United States of America to maintain such action was dependent in any sense upon the determination or proof of the persons who inherited the allotment of the said William Wea, deceased.

3. The court erred in holding and concluding that the determination of heirship by the Secretary of the Interior of the United States was incompetent and immaterial evidence in this cause.

9. The court erred in concluding and holding that it was essential to the right of the plaintiff to recover that proof be made of the names of those who inherited from William Wea, deceased.

Propositions.

1. The Secretary of the Interior had jurisdiction to determine the heirs of the deceased Peoria allottee and his findings were conclusive.

2. The United States in its own behalf was entitled to judgment for the stipulated rental value of the land while it was unlawfully occupied by defendants during the period of restriction.

3. In any event, the United States was suing on behalf of Jesse Rice, a tribal Indian, one of the admitted heirs of William Wea, deceased, and was entitled to judgment for his proportionate part of the rental value of the land while unlawfully occupied.

ARGUMENT.

I.

The Secretary of the Interior had jurisdiction to determine the heirs of the deceased Peoria allottee and his findings were conclusive.

This case grows out of the case of *Bowling* v. *United States*, 233 U. S. 528, decided May 4, 1914. In that case the United States sued in its own behalf and on behalf of the unknown heirs of the Peoria allottee, Pe-te-lon-o-zah, or William Wea (R. No. 177, 1913 Term, p. 4), to set aside certain conveyances of the allotment of this Indian made by persons who purported to be heirs. From the record therein it appears that Charlie Stanley, Mary Big Knife and Orilla Keno Mohawk, purporting to be heirs of the deceased allottee, entered into a contract with one Rundell for the sale of the allotment, and thereafter brought suit against said Rundell in the United States District Court for the Indian Territory to enforce this contract. Judgment was entered sustaining the validity of the contract and these parties thereupon conveyed the land to Rundell, through whom it passed to Bowling and others.

The Government alleged in its bill that this was a fraudulent suit and that the conveyances were void as violating the prohibition against alienation during the restriction period. This court sustained the judgment of the lower court in cancelling these conveyances, and also sustained the authority of the United States to enforce these restrictions against alienation.

Inasmuch as the patent was issued April 8, 1890, with a 25-year period of restriction against alienation, this restriction expired April 8, 1915, and the present suit was instituted March 4, 1915, within the restricted period, to recover possession of the land and damages for the time it was unlawfully withheld by defendants. During the pendency of the suit, as shown, the period of restriction expired and a demurrer was filed to the petition on the ground that, among others, the United States had no capacity to maintain the suit. The court overruled this demurrer and in its opinion said that while there might be a doubt whether the United States, after expiration of the period of restriction, could sue to recover possession of the land, it still had jurisdiction to maintain a suit for damages for the unlawful possession during the restricted period. Upon hearing the court gave judgment for defendants apparently because in its opinion no admissible evidence of heirship was adduced by the Government.

The Circuit Court of Appeals held that there was no error in striking from plaintiff's petition Exhibit B showing the findings of the Secretary of the Interior and excluding these findings from the evidence. It said in substance that it was conceded that the Secretary had the power to ascertain the heirs of the deceased Indian when such action was essential to the issuance of a final patent to the heirs, or the approval of a conveyance by the heirs; nevertheless, as in this case the land had been patented to the

allottee and under the provisions of section 5 of the Act of February 8, 1887, c. 119, 24 Stat. 388, 389, the laws of the State of Kansas regulating the descent and partition of land were made applicable, the title of the heirs was not made dependent upon the action of the Secretary because Congress had released its control over the descent and partition thereof.

This decision rests upon two propositions: First, that only in the event the Secretary's execution of the power to ascertain the heirs was called into play by the approval of a conveyance by the heirs, or in the issuance of a final patent to them, has the Secretary such power; second, that Congress, by making the laws of descent and partition of Kansas applicable to these allotments (section 5 of the General Allotment Act), released control over the descent and partition of the lands and made them subject to the ordinary judicial processes of the State, and therefore the Secretary had no jurisdiction to ascertain the heirs.

We think the concession of the Circuit Court of Appeals that the Secretary has authority to determine the question of heirship of deceased allottees, when such action is essential to the issuance of a final patent to the heirs or the approval of a conveyance by the heirs, is fatal to the judgment rendered by that court. If the Secretary has such jurisdiction upon an application to sell or for the issuance of a fee patent to the heirs, he must necessarily apply the appropriate laws of descent and distribution to determine the heirs. If it can be contended that Con-

gress ever committed to the state court of Oklahoma jurisdiction to determine the heirs of deceased allottees who held patents in fee with restrictions on alienation, the fact that it later conferred upon the Secretary this jurisdiction, as we shall undertake to show was done, "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell* v. *Commons*, 239 U. S. 506, 508.

While the Act of February 8, 1887, did provide that the laws of descent and partition in Kansas should be applicable to Indian allotments before the formation of the Territory of Oklahoma, it does not appear that Congress ever specifically conferred upon any tribunal authority to determine the heirs of such deceased allottees.

By the Act of May 2, 1890 (providing for the formation of the Territory of Oklahoma), c. 182, 26 Stat. 81, 93, §§ 29 and 31, the laws of descent and distribution of the State of Arkansas were made applicable to lands in the Indian Territory, in which these lands then were, and jurisdiction was conferred upon the United States court in the Indian Territory in matters of descent and distribution. Since the formation of the State of Oklahoma there is no specific Act conferring jurisdiction upon the probate courts of that State to determine heirs of deceased allottees who held allotments under fee patents with restrictions on alienation.

It is not necessary, however, to determine what tribunal had jurisdiction upon the death of the allottee in 1894 to ascertain his heirs, or in this case, to settle

the question whether the laws of descent and distribution of Kansas or Arkansas governed the descent of this property. So far as the record shows there was no determination of heirship by any tribunal prior to the action of the Secretary of the Interior October 19, 1914, when he found that the 17 persons named in the exhibit attached to the petition were such heirs. Obviously, there could have been no determination of this question which would bind the United States and these 17 persons, of which they had no notice and in an action to which they were not parties. The record in the original suit does not disclose any valid determination of this question binding upon these parties. In the absence of any prior valid judgment determining the heirs at the date of the hearing and determination by the Secretary, the question of the latter's jurisdiction must be determined by the law as it then existed, *Hallowell* v. *Commons, supra,* while the question as to what law of descent or partition should be applied by the tribunal exercising jurisdiction to ascertain the heirs depends upon the law in force at the date of the allottee's death, to-wit, January 23, 1894.

The Secretary of the Interior has for a long time been authorized to determine, and has determined, under rules and regulations promulgated by him, the heirship of lands of deceased allottees to whom patents in fee had been issued with restrictions on alienation. It is perhaps unnecessary to analyze all the Acts conferring such authority upon him, but we have set out below some of the most pertinent.

By the Act of June 7, 1897, c. 3, 30 Stat. 62, 72, the adult allottees of land in the Peoria reservation in the Quapaw Agency of Indian Territory who had received allotments of 200 acres of land were authorized to sell 100 acres thereof under such rules and regulations as the Secretary of the Interior might prescribe. This Act was modified by the Act of May 31, 1900, c. 598, 31 Stat. 221, 248, so as to permit adult heirs of deceased Peoria or Miami allottees to sell and convey the inherited land from such decedent, and if there were both adult and minor owners, the minors were to join in the sale by a guardian duly appointed by a proper court, but all conveyances made under this law were to be subject to approval by the Secretary of the Interior.

The same right to dispose of inherited lands, subject to the approval of the Secretary of the Interior, conferred upon the Peoria and Miami Indians and others by the Act of May 31, 1900, *supra*, was extended to the adult heirs of "any deceased Indian to whom a trust or other patent containing a restriction upon alienation has been or shall be issued for lands allotted to him," by section 7 of the Act of May 27, 1902, c. 888, 32 Stat. 245, 275.

Following the enactment of the latter Act the Secretary of the Interior promulgated on October 4, 1902, rules and regulations for the conveyance of inherited Indian lands. In these rules the Secretary, after setting out the requirements for the approval of the sale, reserved the right to require, if in his judgment it should be considered necessary, such fur-

ther and additional evidence relative to heirship as may be deemed proper.

In the Indian Appropriation Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1018, noncompetent Indians to whom patents containing restrictions upon alienation had been issued, or who might have an interest in any allotment by inheritance, were authorized to sell such allotment or inherited interest under such rules and regulations as the Secretary of the Interior might prescribe, the conveyances to be approved by the Secretary of the Interior.

After the passage of the Act of June 25, 1910, c. 431, 36 Stat. 855, being "An Act to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes," the Secretary of the Interior on October 12, 1910, amended the rules and regulations relating to the issuance of patents in fee and certificates of competency, and for the sale of allotted and inherited Indian lands, except those belonging to the Five Civilized Tribes. On page 17 of these Rules and Regulations he Act of May 31, 1900, *supra*, authorizing the sale of inherited lands by heirs of deceased Peoria and Miami allottees, is specially referred to, and the amended rules and regulations made applicable thereto. Under these rules and regulations notice of hearing of petition for sale of inherited lands is provided for on page 10, and the procedure is set out on page 6. This procedure provides that all persons known to be entitled to participate, and all

persons known to claim to be entitled to participate, must be notified of the time and place of the hearing. The superintendent is directed to secure the attendance of at least two disinterested witnesses, acquainted with the family history, and the heirs of those claiming to be such are required to fully set forth their claims. Testimony is to be reduced to writing and sworn to, and other pertinent regulations are prescribed.

And on September 13, 1915, the Secretary promulgated the latest rules and regulations for the determination of heirs and approval of wills.

The authority of the Secretary to determine the heirs in order to approve the sale of inherited allotments, or to issue a fee simple patent to each of the heirs, for his or her proportion of the allotment, as found by the Circuit Court of Appeals in this case, necessarily conferred jurisdiction upon that officer to determine the heirs of the allottee generally. We insist that this authority to determine the heirs is necessarily conclusive, for if any other tribunal had authority to determine who were the heirs of the allottee, contrary to the judgment of the Secretary of the Interior, such determination would in effect be an alienation of the land without the approval of the Secretary, and would be a violation of the restriction on alienation contained in the Act of March 2, 1889, under which patent issued.

We do not, however, rest the right of the Secretary to determine the heirs of the deceased allottee alone upon the necessary jurisdiction resulting from his

authority to approve sales of inherited allotments, or to issue patents in fee to each of the heirs for his or her portion of the allotment. This authority of the Secretary, and the practice of the Department in inheritance cases, are clearly authorized and approved by Acts of Congress appropriating money for conducting heirship proceedings by that officer.

Since the Act of May 27, 1902, the Secretary has exercised jurisdiction to determine the heirs as a necessary incident to the approval of a sale of inherited lands generally, and since the Act of May 31, 1900, this jurisdiction has been exercised in the case of the heirs of deceased Peoria and Miami allottees, but it does not clearly appear from any public documents when the Indian Office commenced the practice of adjudicating inheritance cases where no application for sale or for the issuance of patent in fee had been received. It would seem to follow irresistibly, however, that if the Secretary had jurisdiction to determine the heirs in the case of the sale of restricted allotments, he has the necessary jurisdiction during the restricted period to determine who are entitled to any of the proceeds arising from the use of the restricted allotment, whether such proceeds arise out of contract, express or implied. Therefore the Circuit Court of Appeals fell into manifest error when it conceded the jurisdiction of the Secretary of the Interior to determine the heirs in the case of the sale of this land, but denied his jurisdiction to determine the heirs for the purpose of distributing the proceeds of any judgment entered against de-

fendants for the unlawful occupancy of the restricted allotment.

The following legislative and administrative history shows that Congress has approved and authorized the practice of the Indian Department in determining the heirs of deceased Indians, whether the allottees had trust patents or patents in fee with restrictions on alienation.

In Senate Report No. 519 (vol. 2, p. 23, 63rd Cong., 2d sess.), the committee in reporting that the Secretary of the Interior has asked for $100,000 for the purpose of determining the heirs of deceased Indians, and in suggesting certain amendments, among others one authorizing the Secretary to require the attendance of witnesses at hearings upon proper showing by any of the parties, under such rules and regulations as he might prescribe, says:

> It appears that between forty and fifty thousand heirship cases are pending undetermined, representing Indian lands worth about $60,000,000. The Indians can not dispose of this land until the heirs are determined and this is one of the largest tasks to which this administration has fallen heir. It appears from the statement of Mr. Merritt that the work is more than self-supporting and the item will take nothing from the Federal Treasury.

Upon this report the Act of August 1, 1914, c. 222, 38 Stat. 582, 586, was passed, appropriating money for the determination of the heirs of deceased Indians, the scope of the determination being stated therein

as follows: "For the purpose of determining the heirs of deceased Indian allottees having any right, title, or interest in any trust or *restricted* allotment."

It is true that the Act of June 25, 1910, as amended by the Act of February 14, 1913, 37 Stat. 678, 679, referred to in the opinion of the court below, conferred jurisdiction on the Secretary to determine the heirs only in the case of deceased allottees who held trust patents, but by the Act of August 1, 1914, as quoted herein, Congress specifically approved the practice of the Indian department in determining the heirs of deceased allottees who held patents in fee with restrictions on alienation, and expressly appropriated money for the Secretary's determination of the heirs of allottees having any right or interest in any such allotment.

Similar provisions are carried in the following appropriation Acts: Act of May 18, 1916, c. 125, 39 Stat. 123, 127; Act of March 2, 1917, c. 146, 39 Stat. 969, 972.

In the report of the Commissioner of Indian Affairs for the fiscal year ending June 30, 1914, at page 61, it is stated that 5,492 estates of deceased Indians who held their allotments under trust patents, and 388 estates of deceased Indians who held their allotments under restricted fee patents, were acted upon by the Secretary of the Interior during the year, and that there were then pending approximately 40,000 cases to be determined.

The subsequent reports of the Commissioner show:

For 1915, p. 42, the estates of 566 deceased Indians

holding allotments under restricted fee were passed upon by the Secretary, and hearings were held on 30 reservations.

For 1916, p. 51, that 4,086 estates of deceased Indians were probated, and 5,014 miscellaneous cases disposed of, but no separate report is made of estates of deceased allottees who held patents in fee with restrictions.

For 1917, p. 53, that "In the determination of the heirs to Indian estates, the department occupies the position of a probate court, and operates under regulations as to notice and hearing, etc., very much as would such a court"; 2,951 estates were determined.

For 1918, p. 57, that 2,415 cases were finally disposed of, but these are not divided between trust allotments and restricted fee patents.

For 1919, p. 56, that 1,887 suits were settled under trust patents, 176 under restricted fee patents, and 97 inherited interests.

For 1920, p. 46, final disposition was made of 5,368 heirship cases, 322 were those on which restricted fee patents had issued, and 115 were inherited interest cases.

Thus it is seen that the practice of the Interior Department in exercising jurisdiction to determine heirs of allottees holding patents in fee with restrictions on alienation has not only been approved by Congress but has become a rule of property. To disturb the findings of the Secretary in the thousands of cases where he has determined the heirs of this class of Indian

allottees would be to cloud hundreds of titles and give rise to a great deal of troublesome and vexatious litigation. It is apparent, too, that a final determination that the Secretary is without authority to ascertain the heirs of such deceased allottees would seriously hamper the Interior Department in its work of protecting the interests of the Indians and settling the affairs of Indian wards who hold inherited or allotted lands under restricted fee patents.

It follows that the courts below erred in striking from the petition the certified copy of the findings of the Secretary as to the heirs of the deceased allottee, and in rejecting the same when offered in evidence.

II.

The United States in its own behalf was entitled to judgment for the stipulated rental value of the land while it was unlawfully occupied by defendants during the period of restriction.

There are no specific assignments of error covering this proposition in the Circuit Court of Appeals, the assignments being general that the court erred in rendering judgment against plaintiff and in favor of defendants, and that the judgment rendered by the court was contrary to law. The Circuit Court of Appeals refused to consider these assignments of error. While these assignments did not comply with the rules in that they failed to point out the particular errors to be urged, nevertheless, courts will in their discretion notice a plain error not assigned, *United*

States v. *Tennessee & Coosa R. R. Co.*, 176 U. S. 242; and Rule 35 of this court expressly so provides. We insist that in the face of the stipulation of the rental value of the land during the restricted period, it was plain error not to enter judgment for plaintiff for that amount regardless of who were the heirs of the deceased allottee.

This suit was instituted not only to recover possession of the land, but also to recover the fair rental value thereof while it was unlawfully occupied by defendants, and was commenced before the period of restriction expired. The representation by the United States of these Indians was full and complete, *Heckman* v. *United States*, 224 U. S. 413. It was as much the governmental policy of the United States to protect allotments from unlawful occupancy during the restricted period as it was to enforce the restriction against alienation, the latter right being specifically upheld in this case upon its former hearing, *Bowling* v. *United States*, *supra*.

It is "to stick in the bark" to say that the United States could set aside conveyances as clouds upon the title, but could not recover possession of the land and damages for its unlawful occupancy. The fact that during the trial of the case the period of restriction expired did not deprive the United States of jurisdiction to recover for the violation of this law during the restricted period. The District Court specifically so held in this case, and the case of *Goat* v. *United States*, 224 U. S. 458, is authority clearly in point. In that case the United States

sued after April 21, 1904, to cancel certain conveyances made by Seminole freedmen, and among other classes of conveyances involved were those made by adult freedmen allottees prior to the Act of April 21, 1904, c. 1402, 33 Stat. 189, 204, which removed restrictions on alienation. There was a demurrer to the bill on the ground that the United States had no capacity to maintain the suit. The court said that in all material respects the case stood upon the same footing as that of *Heckman* v. *United States*, *supra*, and overruled the demurrer. See, also, *Deming Inv. Co.* v. *United States*, 224 U. S. 471.

If the insertion in the petition, therefore, of named persons as the heirs of the deceased allottee was mere surplusage, the Government was entitled to judgment in the absence of any allegation as to who were the heirs.

Since the representation of the heirs of the deceased allottee by the United States was complete, payment of a judgment rendered in favor of the United States for the rental value of the land during its unlawful occupancy by defendants would have been a full acquittal to the defendants of their liability for such unlawful occupancy. It is immaterial, therefore, to the defendants who were the heirs on whose behalf, as well as on its own behalf, the United States sued. The question as to what disposition might be made of the proceeds of the judgment was not one in which the defendants were interested, and since the United States had authority to maintain the suit on its own behalf, the court erred

in not entering judgment for plaintiff in the sum of $2,500, the stipulated rental value of the land for the period of its unlawful occupancy.

III.

In any event, the United States was suing on behalf of Jesse Rice, a tribal Indian, one of the admitted heirs of William Wea, deceased, and was entitled to judgment for his proportionate part of the rental value of the land while unlawfully occupied.

We insist that while this proposition is not supported by a specific assignment of error, the error is so plain that the Government is entitled to raise it under the general assignment of error and under the rule by which the court reserves the right to notice plain error though not assigned.

The answer of defendants admits the allegations of the petition that Jesse Rice was one of the heirs of the deceased allottee, and there is no denial of the allegation that he was a tribal Indian and under the supervision of the Quapaw Agency. If the court should by any chance hold that it was necessary for the Government to prove on whose behalf it was maintaining this suit for the recovery of the rental value of the land during the period of restriction, the Government met this burden so far as one of the heirs is concerned, and it is plain error not to have rendered judgment for at least this heir's proportion thereof.

CONCLUSION.

For the errors assigned and for the errors apparent on the face of the record, the judgments of the courts

below should be reversed and the case remanded with directions to enter judgment for plaintiff for the stipulated rental value of the land during the period of its unlawful occupancy.

Respectfully submitted,

LESLIE C. GARNETT,
Special Assistant to the Attorney General.

APRIL, 1921.

APPENDIX.

In the District Court of the United States for the Eastern District of Oklahoma. *United States of America* v. *Geo. E. Bowling et al.*, defendants. Law No. 2264.

MEMORANDUM DECISION.

CAMPBELL, D. J.:

There were submitted together in this case for the consideration of the court the separate demurrer of defendant Francis McMasters and the motion to strike out a portion of the petition, filed on behalf of the defendants George E. Bowling and Miami Investment Co.

First taking up the demurrer, the grounds urged therein are that the petition does not state facts sufficient to constitute a cause of action; that the plaintiff has no legal capacity to maintain the suit; and that the petition shows upon its face that the plaintiff is not entitled to the relief sought, and has no right to the possession of the premises sought to be recovered, and also shows that the plaintiff has no legal right to maintain this suit for and on behalf of the parties mentioned and designated in the petition as being entitled to the possession of the land.

The land involved in this case comprises the allotment of William Wea, an Indian, which was involved in the case of the *United States* v. *George E. Bowling and the Miami Investment Co.*, two of the defendants in this case, 233 U. S. 528. That was an action on

behalf of the heirs of William Wea, prosecuted by the United States in its own name, to cancel certain conveyances and the judgment of the United States Court for the Indian Territory, under which the defendants claimed title to the land. In that case it was held that the United States has capacity to maintain the suit to cancel such conveyances and judgment, and the decree of this court cancelling the same, was accordingly affirmed by the Supreme Court, holding it no longer to be an open question that the United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed. If the United States may, during the continuance of the restriction period, maintain a suit to cancel conveyances or judgments which are made or entered in violation of the laws relating to restrictions upon alienation, it would seem to follow that where, during the continuance of such restriction period, the Indian is dispossessed of the and by one having no right or title to the same, the United States can maintain a suit in ejectment in the interest of the Indian to oust such trespasser and restore the Indian to his rightful possession. And this is true as we have seen in the Bowling case, supra, whether the land is in the hands of the original allottee or his heirs. It follows that as the land in controversy was subject to restrictions upon alienation at the time this action commenced, the United States had capacity to sue in the interest of the heirs for the possession of the land. True this suit was filed on January 20, 1915, and the restriction period expired April 8, of the same year. It is a very serious question whether now, after the expiration of the restriction period, judgment may be entered

in this case in favor of the United States for possession of the land; but as the suit also involves recovery of damages for the unlawful possession of the land pending the restriction period, I am of the opinion that the United States has capacity to still maintain the suit, at least for that purpose. Whether it shall do so or whether, in view of the fact that the restriction period having expired it might devolve upon the heirs to maintain the action for possession, in which event they could as well join the action for damages, it shall be deemed best to continue this action, is not a question for judicial determination.

Regardless of the question raised by brief of counsel for the defendent, as to the authority of the Secretary of the Interior under the provisions of the act of June 25, 1910 (36 Stat. 855), as amended by the act of February 14, 1913 (37 Stat. 678), to determine who are the heirs in this case, the amended petition states a cause of action good as against the demurrer.

The patent involved in this case is not what is determined a "trust patent" but is a "fee simple patent," notwithstanding the land conveyed is subject to restrictions upon alienation. *Libby* v. *Clark*, 118 U. S. 250. It is only in the case of an allottee dying intestate before the expiration of the trust period and before the issuance of a fee simple patent, that the acts of Congress above referred to authorize the Secretary of the Interior to determine the question of heirship.

Upon a careful consideration of these acts, I am convinced that they do not give the Secretary such power in cases of allotments such as this, where the fee simple patent has issued and the allottee dies pending the restriction period. In such case the

question is one for determination by the proper court, rather than the Secretary of the Interior.

It follows from what has been said that the demurrer interposed by the defendent McMasters must be overruled. The motion filed by the defendents Bowling and Miami Investment Co., to strike that portion of the petition setting forth the action of the Secretary of the Interior in declaring who are the heirs, must be sustained.

RALPH E. CAMPBELL, *Judge.*

○

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No. 785

In the Supreme Court of the United States

OCTOBER TERM, 1937

Interstate Circuit, Inc., Appellant,

vs.

United States of America, Appellee.

Appeal from the District Court of the United States for the Western District of Texas.

BRIEF FOR APPELLANT IN REPLY

INDEX

PAGE

Statement ---------- 3

Joinder in Error ---------- 7

ARGUMENT

1. The petition was wholly insufficient in not stating facts showing heirship ---------- 8

2. The Secretary of the Interior did not have the right to determine the heirs of William Wea, as final patent in fee simple had issued---------- 11

3. The Act of Congress would be unconstitutional, as attempted to be applied in this case, as it would deprive the heirs of a jury trial and deprive them of their property without due process of law-- 14

4. The evidence was wholly insufficient to warrant a recovery---------- 16

5. The only question involved in this hearing is the power of the Secretary of the Interior to determine the heirship. All others have been waived by failure to make proper assignments of error or ask declarations of law or findings of facts---------- 18

AUTHORITIES CITED

Amendmenet to Constitution, Art. VII---------- 16

Act of Con. Fed. Stat. Annotated, Vol. 1 (1912), p. 96--- 11

Buck vs. Branson, 34 Okla. 807---------- 13

Black vs. Jackson, 177 U. S. 349---------- 16

Coles vs. Northrup, 66 Fed. R. 831---------- 16

Carlson vs. Sullivan, 146 Fed. R. 476---------- 16

Craig vs. Welch-Heckley Coal & Oil Co., 74 S. W. 1035-- 9

Buttle vs. DeBaum, 93 N. W. 15---------- 9

Fite vs. Orr's Assignee, 1 S W. 582---------- 9

Garner vs. McCollough, 48 Mo. 318 9

Finnegan vs. Finnegan, 25 N. E. 341 9

Jones vs. St. Louis, Kansas City, etc., R. R. Co., 79 Mo. 1 (97) 10

Langston vs. Edwards *et al.*, 54 S. W. 833 9

Liby vs. Clark, 6 Sup. Ct. Rep. 1045 12

Light vs. Canadian Co. Bank, 2 Okla. 551 14

Montgomery vs. White, 11 S. W. 10 9

McGuire vs. Pensacola City Co., 105 Fed. 677 16

Nichol vs. Fallen, 12 S. W. 767 8

N. J. Land, etc., Co. v. Gardner, etc., Lumber Co., 190 Fed. 861 16

Potts vs. Hollen, 177 U. S. 365 16

Reiners vs. Brandhorts, 59 How. Pr. 91 9

Smith & Kinser vs. Dean, 19 Mo. 63 (l. c. 64) 9

United States vs. Bowling, 233 U. S. 529 12

In the

Supreme Court of the United States

OCTOBER TERM, 1920

UNITED STATES OF AMERICA, *Plaintiff in Error,*

vs.

GEORGE E. BOWLING, FRANCIS MCMASTER, and MIAMI INVESTMENT COMPANY, a Corporation,
Defendants in Error.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR THE DEFENDANTS IN ERROR

No. 295.

STATEMENT OF CASE

I.

This is a suit instituted by the United States against three defendants to recover possession of a tract of land situated in what was formerly a portion of the Peoria Reservation, now a part of Ottawa county, Oklahoma.

The suit is to all intent and purpose one simply in ejectment. It is charged in the petition that the lands in controversy, de

scribing them, were duly allotted under and by virtue of Act of Congress approved March 2, 1889, to one William Wea, and that on the 8th day of April, 1890, in pursuance to said allotment, there was duly issued to the said William Wea a patent conveying the said land unto him and his heirs, and a copy of the patent so alleged is attached to the petition and marked Exhibit "A". By an examination of this patent it will be seen at once that it is not a mere trust certificate showing that the Government held the land in trust for the allottee and that it would at the expiration of the trust period deliver to him or to his heirs a final patent; but that it is in and of itself a final patent conveying the title to said allottee and to his heirs and assigns forever, and that it is in such shape and form as the courts have many times held transferred to him a fee simple title.

It will be seen by an examination of the Act under which this allotment was made that the patent is in exact conformity to the Act, and it will also be seen that the Act provided that lands allotted thereunder should descend according to the law of descent and partition of the state of Kansas.

Following the allegation as to the allotment of the said land is a further statement that the said allottee died intestate on or about the 23d day of January, 1894, seized of the real estate above described, and then continues in this language:

> "leaving as his sole heirs at law the persons set out in Exhibit 'B' hereto attached and made a part of this petition."

Attached to the petition is Exhibit "B" referred to (Record, page 4). By reference to this it will be seen that it contains a list of names of various parties charged to have an interest in the premises, and after each name is set forth the supposed relationship of the parties named to the original allottee, with a statement thereafter of the proportionate part of the land which it is claimed descended to him or her.

It will also be seen by an examination of this Exhibit "B" that it nowhere states that any or all of the parties who, under the Kansas law of descent, would have had a prior right to this inheritance are dead or alive, nor does it set forth any fact from which it can be seen that these parties, although they may sustain the relationship there charged to the allottee, were the heirs and only heirs of said allottee. The statement that they are such heirs is a conclusion and a mere conclusion of the pleader. There are no other allegations in the petition showing or in any way tending to show in what way the parties mentioned in Exhibit "B" became entitled to this land. In order for this to appear there should have been an allegation as to the manner of the descent of this land.

The petition then alleges:

> "Said persons who are set out in Exhibit 'B' were duly declared the heirs at law of William Wea by the Secretary of the Interior on October 19, 1914, pursuant to the Acts of Congress with reference thereto. And said heirs are now entitled to the immediate possession of the same."

It will be seen from this allegation that it is the contention of the pleader that the Secretary of the Interior had a right to determine, and did determine, who were and who were not the heirs of the original allottee, and that the determination so made is final.

The defendants in this case contend that the Secretary of the Interior had no right whatever to determine who were and who were not the heirs of William Wea, the original allottee in this case. This determination as to who were and who were not heirs, by the Secretary of the Interior, appears to have been made by him, under and by virtue of the provisions of a special Act of Congress passed and approved June 25, 1910, entitled: "An Act to Provide for Determining the Heirs of Deceased Indians, for the Disposition and Sale of Allotments

of Deceased Indians, for the Leasing of Allotments and for other purposes."

The petition then charges as follows:

> "That on or about the first day of January, 1904, the defendants unlawfully entered into and now are in possession and actual occupancy of said premises without leave of the plaintiff, or its agents, and without the consent of said heirs, or any right or title thereto and unlawfully withhold the possession thereof from the heirs of the said William Wea, deceased, and upon demand have refused and continue to refuse to deliver the possession thereof to the plaintiff, its officers and agents, and the said heirs of the said William Wea, deceased.
>
> Plaintiff further states that said defendants have unlawfully kept the heirs of the said William Wea, deceased, out of the possession of said property for the past ten years, beginning with the month of January, 1904, and that the reasonable annual rental market value of said property is $500.00, and that said defendants have collected and used for their own benefit during said time the rents and profits arising from said real estate amounting to $5,000.00."

This is followed by a prayer for possession and damages. The defendants in error George E. Bowling and Miami Investment Company on April 5, 1915, filed a motion to strike out the part of the petition charging that the Honorable Secretary of the Interior had determined the heirship of said deceased allottee, and on the same day the other defendant in error filed a demurrer. On March 16, 1916, the honorable district judge sustained the motion to strike out and overruled the demurrer.

In making these findings the honorable district judge filed a memorandum opinion, which is printed in full as an appendix to Brief for the United States, page 23.

Thereafter, and in due time the defendants filed answer, and on March 16, 1917, filed their amended answer.

On March 5th, 1918, the cause was tried before the Hon. Ralph E. Campbell, a jury having been waived, and resulted in a finding and judgment for the defendants.

On behalf of the Government, at the hearing of the cause, a stipulation was made, as to the rental value of the land, and that the land was duly allotted and patented to William Wea, a member of the Peoria Tribe of Indians, Allottee No. 103, as shown by exhibit "A" attached to the petition, and that said William Wea died intestate, on or about the 23d day of January, 1894.

The Government then offered in evidence a certified copy of the findings of the Secretary of the Interior, determining the heirs of the said William Wea. To the introduction of this document the defendants in error objected, and their objection was by the court sustained (Rec., pp. 11).

The Government then introduced in evidence the answer of the defendants in error.

The Government then rested.

The defendants in error then introduced in evidence two quit claim deeds.

The trial court entered judgment for the defendants which was affirmed by the Circuit Court of Appeals. 261 Fed. 657.

On the trial in the District Court there was no request of the plaintiff for a finding of facts or for a declaration of law in its favor.

JOINDER IN ERROR

1

The Court did not err in affirming the Judgment of the District Court.

2

The Court did not err in holding and concluding that the

right to maintain the action was dependent on proof of the persons who inherited the allotment in question.

3

The Court did not err in holding that the determination of heirship by the Secretary of the Interior was incompetent in evidence in the cause.

4

The Court did not err in holding that it was essential to the right of recovery that proof be made of the persons who inherited the land in question from William Wea, deceased.

ARGUMENT
INSUFFICIENCY OF PETITION

The petition does not allege the facts from which the court, applying the law, can see that the persons, for whom the suit is prosecuted, are the heirs of William Wea. It only pleads the conclusion of the pleader that such persons are the heirs. This conclusion ought to be made by the court from the facts pleaded.

There should have been a statement as to whether or not the allottee left surviving him descendants, or wife, or parents, or brothers or sisters, and some allegation at least showing that none of the parties who, under the law, would have had a preference in the right of inheritance did not take the land other than by stating it through a mere conclusion of the pleader.

As to the necessity of pleading facts showing heirship, and not mere conclusions of law, we desire to call to the attention of the Court the following. In the cease of *Nickell* v. *Fallen*, 12 S. W. 767, the court said:

> "The allegation that they are her only heirs is but a conclusion of the pleader. It is not an assertion of a fact.

> The fact alleged is that they are the brothers, sisters, etc., of Nancy Fallen. This fact, while it shows the relationship, does not show that the appellants are entitled to inherit the land, for the reason that the father, etc., under the statute, if living, is preferred to the appellant; and in order to entitle them to recover they must allege and prove, if denied, that those standing in priority or right are dead, etc."

Again, in the case of *Fite* v. *Orr's Assignee,* 1 S. W. 582, it is said:

> "A pleading which states that S——— and O——— 'are the only heirs' of a deceased owner of land is bad, as pleading a conclusion of law, and the adverse party admits nothing by failing to answer it."

Again, in the case of *Langston* v. *Edwards et. al.,* 54 S. W. 833, the court said:

> "They allege that they are heirs, and the only heirs, but the facts as to how or by what relationship they became such are not stated."

In the last case the question was raised by demurrer to the petition which was sustained. As holding the same as the above authorities we desire to also call the Court's attention to the following:

Montgomery v. *White,* 11 S. W. 10.
Reiners v. *Brandhorts,* 59 How. Pr. 91.
Craig v. *Welch-Hackley Coal & Oil Co.,* 74 S. W. 1035.
Buttles v. *De Baun,* 93 N. W. 15.
Finnegan v. *Finnegan,* 25 N. E. 341.
Garner v. *McCullough,* 48 Mo. 318.
Smith & Kinser v. *Dean,* 19 Mo. 63, l. c. 64.

Jones v. *St. Louis, Kansas City & Northern Railway Co.*, 79 Mo. l. c. 97. (This opinion was written by John F. Philips when he was Commissioner of the Supreme Court of Missouri).

It has been so generally and so uniformly held that in pleadings it was necessary to set forth facts and not conclusions, that it would hardly appear necessary to cite authorities on this proposition.

The above is very material in this case for the reason that it is charged on the last page of the petition that the defendants are in possession and actual occupancy of the premises without leave of the plaintiff or its agent, and without the consent of *said heirs*, or right or title thereto. Of course the latter part of it "or any right or title thereto" is merely a conclusion of the pleader from other facts stated and is not an allegation of a fact. The facts showing the unlawful holding or the lack of right, attempted to be set forth in the first paragraph, are that we did not have the permission of the plaintiff or those mentioned as heirs. For aught that appears in this petition the defendants may be in possession of this land under authority of the parties who the plaintiff on the facts has concluded are not the heirs, but who are actually the heirs of the deceased allottee. As to whether they are in the possession of the land under authority of those who under the law are the true heirs of William Wea is the ultimate fact to be determined in this case; and the facts showing that they are not so in possession should be clearly and definitely set forth in the petition, and not by intendment nor by the conclusions of the pleader.

It would seem by examination of this petition, taken as a whole, that unless the defendants had permission of some one of those mentioned in Schedule "B" as an heir of the deceased allottee that then and in that case they would be in possession without legal authority so far as the conclusion of the pleader

is concerned, and that the only object of the pleading was to show that as a conclusion of the pleader certain persons were the heirs and that the defendants were in possession without authority of those designated parties. There is no attempt in the pleading to show any other fact or state of facts.

II.

FINDING OF HON. SECRETARY OF INTERIOR

It will be seen that it is the contention of the Government that the Secretary of the Interior had a right to determine who were and who were not the heirs of the original allottee, and that the determination so made is final.

The defendants in error in this case contend that the Secretary of the Interior had no right whatever to determine who were and who were not the heirs of William Wea, the original allottee in this case. This determination as to who were and who were not heirs by the Secretary of the Interior appears to have been made by him under and by virtue of the provisions of a special Act of Congress passed and approved June 25, 1910, entitled,

> "An Act to Provide for Determining the Heirs of Deceased Indians, for the Disposition and Sale of Allotments of Deceased Indians, for the Leasing of Allotments, and for Other Purposes."

This Act is found in Vol. I of Supplement to Federal Statutes, Annotated, for the year 1912, on page 96. By reference to this section we will find that it has this clause:

> "That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of trust period, before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of

> the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

This Act has reference to such cases and such cases only where the Government has issued a trust certificate showing that it holds the land in trust for a certain period of years, at which time it would issue to the holder of the trust certificate or his heirs a final patent, and has no application and attempts to have no application to those where final patents have already issued.

It would appear from an examination of this Section alone that it was never intended to cover a case of the kind and character here presented. In this case there was no certificate ever issued showing that the land was held in trust for the original allottee, and that subsequently a final patent would issue, but the Act itself provided that final patent should be issued at once, and final patents were issued immediately after selections and approval of allotment, and those final patents transferred to the allottee a fee simple title to the land so allotted and patented.

Libby v. *Clark*, 6 Sup. Ct. R. 1045.

This Court has held that this patent to William Wea conveyed a fee simple estate to him.

U. S. v. *George E. Bowling*, 233 U. S. 529.

The Act under which trust certificates were issued provided on its face that it should not be applicable to the confederated Peoria and Miami reservations, where the land in controversy is located.

Afterwards the Act under which the allotment was made

was passed providing, as was done, that final patents should issue, and this shows a marked distinction between the two methods of allotment. The Act here in question shows on its face that this distinction was in the mind of the party who drew the Act, because in a furher clause in the same Section there is provision made for the removing restrictions under certain conditions on the land where final patent has been issued as in this case. By reading this Act we see that the author understood fully the distinction between land covered by these trust certificates and those conveyed by final patent.

The above itself would appear to be sufficient answer to any contention that the Secretary of the Interior had a right to determine the heirship in this case. But we desire to go one step further and suggest to the court if the Act had covered or attempted to cover the facts in this case it would be inoperative and insufficient for that purpose for these reasons: The land was patented by a final patent on April 8, 1890. The allottee died on the 23rd day of January, 1894, and on that date the land descended to and became the property in fee simple of the heirs of the original allottee as designated by the Kansas law of descent then in force.

Buck v. *Branson*, 34 Ok. 807.

This land then immediately upon the death of the allottee vested in his heir or heirs whoever they may have been according to the Kansas Statutes referred to in the above decision. And having so once vested can never be divested except by some voluntary act or neglect on the part of those heirs. *This Act authorizing the Secretary of the Interior to determine heirship was not passed until many years after the title had vested in the heirs.* The question of determining who were and who were not the heir or heirs of William Wea under the law of descent of the State of Kansas was a judicial question

that can be determined by some court of competent jurisdiction, but can be determined in no other manner. If this Act attempted to confer judicial powers on the Secretary of the Interior it could not be available for that purpose, as we will attempt to show in the next paragraph of his brief.

III.

CONSTITUTIONALITY OF THE ACT, AS APPLIED TO THIS CASE

There is a provision of the Federal Constitution which provides: "nor shall any person be deprived of life, liberty or property without due process of law." Being Amendment 5.

In this case to hold that the Secretary of the Interior had a right to determine who was entitled to the land in controversy as the heir of William Wea, would be depriving a claimant to the land of whatever rights he had without due process of law. We understand, of course, that due process of law does not necessarily mean a proceeding in court; that persons can be deprived of their property by due process of law by proceedings other than a suit in court, but the proceeding must be one in conformity with the general law of the land and uniform with the practice at the time its use is sought and in accordance with the customs and usages of common law that prevailed at the time of the adoption of the Constitution; and that in all cases, which at the time of the adoption of the Constitution under the common law as it then prevailed, where the parties were entitled to a trial by jury, that their rights were preserved to them by this clause.

It was said in *Light* v. *Canadian County Bank*, 2 Okla. 551:

> "Due process of law carried with it the right of trial by jury, when trial by jury has been the usual course of administration in the particular class of cases through

courts of justice to which the one in question belongs. That term carries with it the right of trial by jury in all cases in which trial by jury was a part of the usual course of adminitsration through courts of justice at the time the Constitution was adopted. It does not give the right of trial by jury in cases in which it did not exist at that time. It does not give it in the large fields of equitable and admiralty jurisdiction. It does not take away from the courts the power to punish contempts summarily, without the intervention of a jury, as it existed at the time of the adoption of the Constitution."

Defendants in error respectfully call the attention of the Court to the fact that the provision cited in the brief of the Government's counsel making certain appropriations for the use of the Secretary of the Interior does not confer, or purport to confer, upon the Secretary of the Interior any powers in addition to that conferred upon him in Section 1 of the Act of June 25, 1910, already discussed in defendants' brief, except to authorize certain witnesses to be produced in proving heirship, provided for by said Section 1 of the Act referred to, but simply is an appropriation of money for the use of the Secretary of the Interior in carrying out the powers conferred in said Section 1.

Defendants desire also to suggest that if any such construction could be possibly placed upon this appropriation Act as to indicate that the Secretary of the Interior had the right to determine heirship, where full fee simple patent had issued, and deprive them of the right to have their claims determined in court before a jury, it would certainly be in violation of the Constitution of the United States, and would be obnoxious to the provisions of the Constitution vesting the whole judicial power of the Government in the courts.

We understand that this section of the Act of Congress, granting to the Hon. Secretary of the Interior the right to de-

termine heirship where trust certificates have been issued, has as to them been declared constitutional by the Supreme Court of the United States. With those decisions as applied to the cases involved therein, we have no complaint, as they were all actions properly cognizable in a court of equity where no jury could be demanded as a matter of right. But to apply that section to the facts in this case would be giving it a construction that would render it unconstitutional.

Under Art. VII, of Amendments to the Constitution of the United States, the right of a jury trial, as it existed at the common law, at the time of the adoption of the Constitution, was guaranteeed to all parties.

The title involved in this case is a legal one, and in determining the ownership of this land every claimant had a right to demand and have a hearing by jury, which this section involved would deny if given the construction contended for by counsel for the Government.

These defendants in error had and have a right to have each material fact showing their right to this land to be submitted to a jury, without being bound by any facts that may have been found to exist by the Hon. Secretary of the Interior, or anyone else.

Black v. *Jackson*, 177 U. S. 349.
Potts v. *Hollen*, 177 U. S. 365.
N. J. Land & Lumber Co. v. *Gardner-Lacy Lumber Co.*, 190 Fed. 861.
Coles v. *Northrup*, 66 Fed. 831.
McGuire v. *Pensacola City Co.*, 105 Fed. 677.
Carlson v. *Sullivan*, 146 Fed. 476.

IV.

INSUFFICIENCY OF EVIDENCE

For aught that appears in this record the Government may be attemptnig to put defendants off the land against the will

or desire of the true heirs of the original allottee William Wea.

The restrictions upon the sale of this land having expired long prior to the trial of this case, the right to recover possession in this action, if it ever existed, had expired; and the judgment as to possession, of course, had to be in accordance with that fact.

We do not understand that this proposition is disputed by the counsel for the Government.

The petition in this case alleges that the Government is prosecuting this case for the benefit of the specific persons mentioned in Schedule "B" attached to it, and alleges that they and they alone are the heirs of William Wea. It is not alleged or suggested that the defendants are withholding this land from the possession of any other person, or against the will of any other persons. There was no evidence introduced at the trial that these persons were the heirs, or had any right in the land in controversy. This being so, the Government cannot in this case recover the possession for the benefit of any other persons.

The defendants in error desire to further suggest that the petition in this case charged that the defendants were in possession of the land in controversy. The answer admitted this allegation, but there is no admission in the answer as to when they entered into possession, nor how long they had had the possession; nor was there any admissions or proof at the trial of this fact. So far as this record shows the defendants may have entered into the possession of the land the day before the institution of this suit. All of the statements in the brief as to these defendants being in possession for any period of time, or that any other controversies had taken place between the Government and these defendants, and what state of facts may have been shown in any previous suit are entirely outside of the record.

It is not entirely clear from the record in this case exactly the date when this suit was instituted, but we gather from the record that it was only about a month or such matter prior to the expiration of all the restrictions contained in the patent. The amended petition which was filed before the defendants were required to plead, and before the defendants in error Bowling and Miami Investment were served or appeared, was filed March 4th, 1915. The restrictions expired April 5, 1915.

WAIVER OF ALLEGED ERRORS

The only real question here involved is the power of the Secretary of the Interior to determine the heirship of William Wea, deceased—

All others have been waived—

On this question we desire only to specifically call to the attention of the Court the two concluding paragraphs of the opinion of Circuit Court of Appeals in affirming the case, as found in 261 Fed. 657.

We respectfully submit that upon the whole record in this case the judgment was for the right parties, and the only one that could have been properly entered at the trial, and that the same should be affirmed.

Respectfully submitted,

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